TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 282.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CAREEN.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JANUARY 29, 1900.

(13,270.)

(18,370.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CARLIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the northern district of Texas	1	1
Caption	1	1
Plaintiff's first amended original petition	1	1
Defendant's amended answer	7	6
Final judgment	8	7
Amended motion for new trial	9	8
Order overruling motion for new trial	11	10
Order extending time in which to file bill of exceptions	12	10
Defendant's bill of exceptions	12	11
Testimony of Ed. Carroll for plaintiff	12	11
Chas. Nichols for plaintiff	16	14
Michael Carlin for plaintiff	19	16
E. M. Carver for plaintiff	20	18
I. E. Line for defendant	22	19
Ed. Carver, recalled for defendant	23	20
F. J. Huntoon	23	20
George Welsh for defendant	24	20
F. W. Race for defendant	25	21

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	Original.	Print
Charge of the court	26	22
Charge No. 6 given at request of defendant	27	23
Charges requested by defendant refused	28	23
Judge's certificate	30	26
Assignment of errors	31	26
Petition for writ of error	34	29
Writ of error bond	36	30
Writ of error	37	31
Citation and acceptance of service thereon	38	32
List of papers for transcript	39	33
Clerk's certificate	40	34
Argument and submission	41	34
Judgment	42	34
Opinion of the court	43	35
Assignment of errors	51	40
Bond for writ of error	57	44
Writ of error	58	45
Citation and service	59	46
Certificate of clerk	60	47

a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

Be it remembered that heretofore to wit, on the 13th day of April, 1901, a transcript of the record of the above styled and numbered cause, from the circuit court of the United States, for the northern district of Texas, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following to wit:

1 *Caption.*

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, at Fort Worth, begun and holden at Fort Worth, Texas, on the 26th day of November, A. D. 1900, and which term adjourned on the 19th day of January, A. D. 1901, the Honorable Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

MICHAEL CARLIN
versus
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Plaintiff's First Amended Original Petition.

Filed December 10th, 1900.

In the Circuit Court of the United States for the Northern District of Texas.

M. CARLIN
vs.
THE T. & P. R'Y Co. } No. 129.

To the Hon. E. R. Meek, judge of said court:

Now comes your petitioner, M. Carlin, a resident and citizen of the county of Tarrant and State of Texas, in the said northern dis-

trict of Texas, and by leave of the court files this his first amended original petition and complaining of the Texas & Pacific R'y Co., a corporation duly incorporated under and by virtue of the laws of the United States, the same being a citizen of another and different State than the State of Texas, to wit: the State of New York and complains to this honorable court for that heretofore, to wit: on the — day of Sept., 1898, the said plaintiff was an employé of the said defendant herein and was a member of the bridge gang of the said defendant working on the line of the said defendant's railway between the city of Fort Worth and the city of Weatherford, Texas.

2 That the said defendant is a corporation duly incorporated under and by virtue of the laws of the United States as aforesaid, and owns and operates a line of railroad in the State of Texas running through the counties of Tarrant, Parker and other counties of the said State and in the prosecution of its business of operating said line of railroad it became necessary for it to have, and it did have, amongst other employés, a bridge gang, which gang consisted of a foreman and a number of men whose duty it was, amongst other things, to repair bridges along the line of the said railway company in said counties. That the plaintiff herein as aforesaid was one of the said men who belonged to the said bridge gang and was under the direction and control of the said foreman of the said bridge gang.

That the foreman of the said bridge gang was not a fellow-servant of the said plaintiff herein in the employ of the said defendant. That the said foreman was entrusted by the said railroad company with the authority of superintendence, control and command of the individuals composing the said bridge gang, one of whom was the plaintiff, and all of whom were in the employ of the defendant.

That the said foreman had the authority to direct the said members of the said bridge gang in the performance of the duty of said bridge gang, as well as to employ and discharge the members of said gang, and that said foreman was vice-principal of the said defendant, and was in no manner a fellow-servant with the plaintiff herein.

And the said plaintiff further represents and shows to the court that amongst other things arising in the course of the duty of the said bridge gang, it became necessary to repair a certain bridge on the line of the railway of the said defendant near the Parker County line, that is the line between Parker county and Tarrant county, and that in pursuance of the duty, they acting in accordance therewith and in accordance with the order of the foreman of the said gang, went to the place where the said bridge was situated and with the purpose of repairing the same. That they arrived at the said place in the morning of the day on which happened the accident complained of hereinafter by the plaintiff.

That the duties of this plaintiff in connection with the repairing of the bridge aforesaid consisted amongst other things of his duty to obey the orders and directions of the said foreman, and of his duty to do such other things in and about the repairing of the said bridge as should become necessary under the circumstances. That amongst

other things it was his duty to do was the using of a saw, and
3 that at the time of his arrival at the said bridge as aforesaid,
his saw, which it was necessary for him to use in the repair-
ing of the said bridge, had become dull, and it became and was his
duty to sharpen the said saw, and that in the performance of sharp-
ening the said saw, and under the direction of the said foreman he
proceeded to sharpen the same as aforesaid. That in the sharpen-
ing of the said saw it became necessary for him to erect a temporary
hold for the same, which he proceeded to do on the abutment of the
said bridge, where the same was only high enough to strike him
about the breast. That he was there engaged in preparing to
sharpen his saw as aforesaid when he observed a train approaching
on the line of the said defendant's railroad from the west with great
speed. That he was not in any way warned or notified of the fact
that the said train was approaching or was about to approach the
said bridge at all, much less that the same was approaching or was
about to approach with great speed, but that he saw the train ap-
proaching and that the speed of the train was so great when he saw
same he became alarmed and started to and did walk away from
the approach of the said bridge upon which he had made his tem-
porary fixture for the purpose of sharpening his said saw as afore-
said. That when he noticed the approach of the said train he did
not notice that the said bridge upon which he, with the other
members of the said bridge gang under the direction of the said
foreman as aforesaid and under his control, were preparing to and
were repairing, was not entirely clear of obstruction, and he did not
know, nor did he see, that the said maul was upon said bridge.

And the plaintiff further charges and states the fact to be that the
said bridge at the time of the said approach of the said train was
not clear and free of obstructions, but that there was upon the bridge
a maul, to wit: a spike maul, the same being a heavy iron hammer
of the weight of six or ten pounds, attached to a handle of to wit:
three feet long, lying upon the bridge in such position that the
same could either be struck by the said train or could be jolted into
position to be struck by the said train by reason of the rapid motion
of the said train. The said maul was negligently left in said posi-
tion by one of the said bridge gang.

And plaintiff further charges and states the fact to be that while
he was walking away from the said abutment of the said bridge in
order that he might be some distance therefrom while the said train
was passing at the rapid speed hereinbefore mentioned, he was
struck by the said maul which had been left upon the bridge
4 as aforesaid, on the leg just above the knee. That the said
maul was struck by the said train in its passage over the said
bridge and was hurled by the said train against him, the said plain-
tiff, with such great force that it crushed and mangled his said leg
so that the same had to be and was amputated above the knee.

The plaintiff further charges and states the fact to be that amongst
other things it was the duty of the said railroad company to furnish
him, the said plaintiff, a safe place in which to work, and that it was
the duty of the said railway company by and through its foreman

in charge of the said gang as aforesaid, to see that said bridge upon which they were at work or were about to go to work, and about which they were engaged in the performance of their duties to the said railway company under the direction of its said foreman, was free from any and all obstruction before the said train was allowed to come upon the said bridge.

The plaintiff further charges and states the fact to be that it was the duty of the said foreman to see that the said bridge was clear of any and all obstructions that were likely to or could in the natural order of human events produce accidents to the men engaged in their work as aforesaid. And it was further the duty of the said foreman to see that flagmen were properly placed on either side of the said bridge in order that approaching trains could be and would be signalled to approach said bridge with caution, or to stop entirely as the case may be, until such obstructions as might be or were on said bridge could be by the foreman or under his orders and directions, removed therefrom, and the said bridge made free and clear of any and all obstructions likely to be struck by the said train and in the natural order of events produce injury to any of the said bridge gang working upon or around said bridge.

And the plaintiff further charges and states the fact to be that it was the duty of the said railway company to notify its engineers and conductors in charge of its trains what bridges were being repaired or worked upon and to state to them what bridges were occupied by a gang of bridge workmen working upon or around same in order that their said employés might approach the said bridge with due care and caution and in order that they might be on a special lookout for any and all obstructions that might be or were upon said bridge likely to cause injury to the said men working in, around and upon said bridge in order that the said trainmen might have and would have the said train under such control that they would be able to stop the said train in case they saw the said obstacles, and in order that the said train would not be run at such a rate of speed that it would hurl obstacles laying around the said track with such force as to produce injury to the said men working in, upon and about the said bridge.

And the plaintiff further alleges and states the fact to be that the said railway company and the said foreman negligently failed to perform each and every one of the duties herein alleged and charged to be their duty and states that the said foreman being upon the said bridge at the time of the approach of the said train negligently failing to cause the said maul or hammer to be removed therefrom, or to remove it himself, if he saw the same and that if he did not see the same that he negligently failed to see the same, said hammer being upon the said bridge at the time of the approach of the said train as aforesaid, and negligently failed to remove or have same removed. And the foreman negligently omitted to have flagmen stationed on either side of the said bridge in order that signals might be transmitted to the approaching train, causing the same to approach the said bridge under full control and at low rate of speed; and that the said railway company disregarded its duty in that it

did not inform its said trainmen of the fact that the said bridge was being repaired and that a gang of men would be upon the same repairing same, and in that the said trainmen approached the said bridge under a high rate of speed, to wit: thirty miles an hour, for here and now the plaintiff charges that it was the duty of said trainmen to approach the bridge which was being repaired at a slower and more moderate rate of speed than that at which the same was approached, and that the high rate of speed at which they approached said bridge contributed, amongst other things, to the injury caused to this plaintiff.

And this plaintiff further states and charges the fact to be that the negligence of the duty of the said railway company, and its vice-principals, to wit: its foreman, engineers and fireman whose negligence grew out of *and* the negligence of the company, contributed to and caused the accident hereinbefore complained of.

And this plaintiff further states the fact to be that when the said maul left upon the track as aforesaid was struck by the said train and hurled against him, crushing, bruising and mutilating and destroying his leg as aforesaid, he was thrown upon the ground and became insensible from the shock and pain attendant thereon. That it was many hours before he received or was able to receive any medical attention whatever, and that during said time he suffered the most intense pain of body and great anguish of mind. That in the evening he was sent to the city of Fort Worth and placed
6 in the hospital in said city, and that the physicians after consultation decided that it was necessary to amputate his said leg, and that they did so amputate it, all of which caused him much pain and suffering. That he was in the said hospital for many weeks under the treatment of physicians, during all of which time he suffered great pain. That he was a man of strong and robust constitution, fitted for the duties of foreman of a bridge gang, which had been his occupation for many years previous to the happening of the accident, and that at the time of the happening of the accident he was only temporarily employed for the reason that he was not at that time able to get employment of the grade to which he was entitled. That at the time aforesaid he was a man of about fifty-five years of age, strong and robust as aforesaid, with much experience in the line of bridge workmanship; that his services were actually worth $3.50 per day though at the time as aforesaid, temporarily he was receiving $2.40 per day. That as aforesaid for many weeks he was in the said hospital, utterly unable to stir or move without assistance, and that since the time of the said accident he has been unable to do any work of his employment, and has become utterly and permanently incapacitated from following his occupation as a bridgeman in which he had spent his life and in which all the experience that he had theretofore acquired had been concentrated. That he is incapacitated from earning a living except in so far as he may be assisted by his friends, all through the negligent action of the railway company and its vice-principals as aforesaid. That he has suffered much pain in addi-

tion to the actual physical loss of his leg as aforesaid and of his incapacity to do the work he had been accustomed to do.

That in addition thereto he incurred much expense for doctor's bill and hospital fees during the time aforesaid, in the sum of to wit: $200.00. That through the negligence of the railway company as aforesaid he has suffered great *hury* (hurt) and damage in to wit: the sum of $25,000.

Wherefore, plaintiff prays that the citation issue according to law, and that upon a final hearing of this case he have judgment against the said defendant for the said sum of $25,000.00 his damages as aforesaid, together with interest and costs, and for general relief.

ORRICK & TERRELL,
Attorneys for Plaintiff.

The foregoing has the following endorsements, to wit:

129. M. Carlin vs. Texas & Pacific Railway Co. Plaintiff's original petition. Filed 10th day of Dec., 1900. J. H. Finks, clerk, by J. B. Finks, deputy.

7 *Defendant's Amended Answer.*

Filed December 10th, 1900.

In the Circuit Court of the United States at Fort Worth, Texas.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

Now comes defendant in the above-entitled cause and by leave of the court files this its amended original answer, in lieu of its original answer filed herein on the — day of —— and for such amended answer says:

1. Defendant demurs to plaintiff's petition and says the same is insufficient in law and shows no cause of action against it, of which it prays the judgment of the court.

2. It specially excepts to said petition for the reason that it appears that the alleged acts of the defendant were not the direct and proximate cause of the injuries to plaintiff.

3. For further answer, if so required, defendant denies all and singular the allegations in said petition contained and of this puts itself upon the country.

4. For further and special answer, defendant says plaintiff cannot recover for the reason that if there was any negligence at all of any of its employés, which it denies, that said agents or servants or employés were then and there the fellow-servants of plaintiff and that this defendant is not liable for any of the negligent acts of said parties.

5. For further special answer, defendant says plaintiff cannot recover for the reason that if there is any negligence on the part of this defendant, its agents, or servants, plaintiff himself was also

guilty of negligence which directly caused and contributed to the accident in question.

6. For further special answer defendant says that if there was any negligence or wrong on the part of this defendant, its agents or servants, in any of the acts alleged, that plaintiff was well acquainted with same, knew the manner in which its bridges were constructed, its trains were operated, and also knew that no flagmen had been sent out for the purpose of observing the approach of any trains, and knew fully the manner in which said trains would approach the bridge near which he was working, and that he had made no protest of the same, but remained in service with the full knowledge of the circumstances connected with the same,
8 and by reason of his said acts he should be deemed to have assumed all risks and dangers arising out of same, and by reason of which it says he ought not to recover.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

The foregoing has the following endorsements, to wit:
129. U. S. circuit court, Fort Worth, Texas. Michael Carlin *vs.* T. & P. R'y Co. Defendant's amended answer. Filed 10th day of Dec., 1900. J. H. Finks, clerk, by J. B. Finks, deputy.

Final Judgment.

From the minutes of the circuit court of the United States for the northern district of Texas, at Fort Worth, November term, A. D. 1900.

DECEMBER 11TH, 1900.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

On the 10th day of December, A. D. 1900, this cause came on to be heard and came the plaintiff and defendants by their attorneys and both parties announced ready for trial, then came a jury of twelve good and lawful men, to wit: E. C. Turner and eleven others, who were duly selected, empaneled and sworn to try this case, and after having heard the argument of counsel and receiving the charge of the court, retired to consider of their verdict; and thereafter on the 11th day of December, A. D. 1900, they returned into open court the following verdict, to wit:

"We the jury find for the plaintiff and assess his damages at six thousand dollars.

E. C. TURNER, *Foreman.*"

And the court having heard said verdict approved and ordered same filed.

It is therefore ordered, adjudged and decreed that the plaintiff, Michael Carlin, do have and recover of and from the defendant, The

Texas & Pacific Railway Company, the sum of six thousand ($6000.00) dollars with all costs herein incurred respectively.

It is further ordered that the officers of court do have and recover of and from the parties hereto the costs by them respectively herein incurred, for which execution may issue.

Minute Book 1, pages 509 *et seq.*

9 *Amended Motion for New Trial.*

Filed January 7th, 1901.

In U. S. Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

Now comes the defendant, Texas & Pacific R'y Co., and by leave of court files this its amended motion for new trial and prays the court to set aside the verdict and judgment rendered herein, and grant a new trial for the following reasons:

1. The court erred in the admission of certain testimony, as will appear by bills of exceptions, and in the refusal to admit certain testimony, as will also appear by bills of exceptions.

2. There was error in the court's charge to the jury as follows: "The defendant is bound to exercise ordinary care and to furnish reasonably safe place within which employés can perform their duty. This care to be exercised depends upon any apparent danger which there may be."

3. The court erred in its definition of care, as follows: "Ordinary care is defined in law as such care as a person of ordinary prudence might be expected to exercise under similar circumstances. More than this, the law does not require, but less than this is negligence, or, in other words, negligence consists in omitting to do something which an ordinar-y prudent person would not omit, or in doing something which an ordinar-y prudent man would not do under similar circumstances."

4. The court also erred in charging the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

5. The court erred in charging the jury as follows: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it will be your duty to find for the defendant."

6. The court erred in the definition of what act of negligence would be the proximate cause of the injury, as follows: "And you are charged that an act of negligence is the proximate cause
10 of an injury, if the act of negligence contributing to cause the injury was such an act that an ordinar-y careful and prudent

man could and would have anticipated the causing of the injury, under the facts and circumstances existing at the time, and which were known, or could have been known to him by the exercise of ordinary care, had he been in the foreman's place and stead, and it is not necessary in order to constitute an act of negligence, the proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the particular person hurt would be hurt, nor that the accident or injury should happen or occur in the particular manner in which it did occur."

7. The court erred in refusing to give special charge No. 1, requested by the defendant.

8. The court erred in refusing to give special charge No. 3, requested by the defendant.

9. The court erred in refusing to give special charge No. 4, requested by defendant.

10. The court erred in refusing to give special charge No. 5, requested by the defendant.

11. The court erred in refusing to give special charge No. 7, requested by the defendant.

12. The court erred in refusing to give special charge No. 8, requested by the defendant.

13. The court erred in refusing to give special charge No. 9, requested by the defendant.

14. The verdict of the jury was excessive in amount and more than a fair and just construction of the testimony warranted, as it appeared from the evidence that the plaintiff was 55 years old, a single man and that he would soon be practically unfitted for the position of bridge carpenter, in which he had been practically engaged during his life; and, taking the age of the plaintiff, the testimony showed that he could not much longer act in the capacity and fulfill the duty of a bridge carpenter, and would soon be forced to quit such employment, and there was no evidence to show that his capacity to earn money had otherwise been diminished.

15. The verdict of the jury was contrary to the preponderance and great weight of the testimony, as it appeared that the bridge foreman had exercised due care and diligence in respect to seeing whether the bridge was clear of any obstructions.

16. The verdict of the jury was contrary to the evidence because it appeared that the direct and proximate cause of the injury
11 was evidently the negligence of one of the fellow-servants of plaintiff in leaving the maul so near the track and rails as to cause it to come in contact with the moving train.

17. The verdict was erroneous, because the evidence failed to show that the company was guilty of any act of negligence which was the direct and proximate cause of the injury.

18. The verdict of the jury was erroneous, because if it be granted that the foreman was guilty of negligence in failing to discover the position of the obstruction on the track, such act on his part was that of a fellow-servant of the plaintiff.

19. As it — within the knowledge of the court the evidence in this case required considerable time to be introduced, and the court

allowed ample time for argument, and the jury were not out more than twenty-five or thirty minutes in the consideration of their verdict, from which it is clear that they did not take time to properly consider and discuss the issues of law and fact submitted to them by the court.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendants.

The foregoing has the following endorsement, to wit:
129. In U. S. court. Fort Worth, Texas, M. Carlin *vs.* T. & P. R'y Co. Amended motion for new trial. Filed 7th day of Jan'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Order Overruling for New Trial.

From the minutes of the circuit court of the United States for the northern district of Texas, at Fort Worth, November term, A. D. 1900.

JANUARY 14TH, 1900.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

On this day came on to be heard defendant's motion for a new trial, the court after hearing and considering same is of the opinion that said motion is not well taken, it is therefore ordered that the defendant be and is hereby denied a new trial.
Minute Book 1, page 545.

12 *Order Extending Time in which to File Bill of Exceptions.*

Filed January 16th, 1901.

M. CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. }

In this case it is ordered by the court that thirty days from this date be allowed defendant, The Texas & Pacific Railway Company, in which to prepare and file its several bills of exception in this cause and that the time be so enlarged.
January 16th, 1901.

EDWARD R. MEEK,
Judge Presiding.

The foregoing has the following endorsement, to wit:
129. Order extending time, &c. Filed 16th day of Jan'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Defendant's Bill of Exceptions.

Filed February 1st, 1901.

In the United States Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC R'Y CO.

Be it remembered, that on the 10th day of December, 1900, the above-entitled cause came on to be heard in the United States circuit court for the northern district of Texas, before Judge E. R. Meek, and a jury having been empaneled the following proceedings were had:

The pleadings having been read to the jury the following evidence, both for the plaintiff and defendant, was introduced before the court and the jury to sustain their respective contentions:

ED. CARROLL, witness for plaintiff, testified:

That in September, 1898, he was working for the T. & P. R'y Co. in what is known as the bridge gang. That Michael Carlin,
13 the plaintiff, was a member of this bridge gang and George Welsh was foreman of same. That it was the duty of the bridge gang under the directions of George Welsh, the foreman, to do work upon bridges in the way of building and repairing same. That he remembers the time of the accident occurring to plaintiff, Carlin. That on the day of the accident they left Weatherford, Texas, to go to work on a bridge near the Aledo water tank. This bridge was over a creek, was about sixty to seventy-five feet long and the approaches to the span were about thirty or forty feet. The water tank stood on the south side of the track, 60 to 75 feet from the end of the approach. On the west side the track was straight to a point between half a mile and a mile distant from the bridge, when there was a curve. They got to the bridge to go to work about 8.10 in the morning and went to work under Welsh, the foreman. There was a man by name of Line who was under Welsh. Just before the accident occurred, he was east of the bridge going after a piece of scantling, and heard some one say the train was coming and stepped off the track, and pretty soon after he stepped off the track the train passed him. That the train was a freight train going about thirty-five or forty miles an hour, and he did not know whether it carried flags or not. It was near the bridge before he saw it and had no notice given of its approach till some one said it was coming, and it was in 100 feet of the bridge. When the train got to the bridge, some of the men were on the bridge, some on the outside framing some timbers and some doing one thing and another. At the time the men were engaged in making repairs on the bridge. Soon after the train passed he looked around and saw Carlin lying on the ground near the bank, about sixty feet distant from the

witness. That they went and picked Carlin up and some one picked up a spike maul lying on the other side of Carlin with the handle broken off. That he had seen the spike maul before, that it had been used ever since he had been at work with the bridge gang and it had been used on the track that morning. That he had seen some of the men driving spikes and nails with it about ten or fifteen minutes before Carlin was hurt. Carlin was close to the end of the bridge. That when they picked him up they found his leg was crushed. That they then put him on a hand car and some of the men went off to the station east with him. That there were no flags out on the bridge that morning. That he heard no warning concerning the approach of the train except the warning that he testified about. At that time the engine was very near the west approach of the bridge. That he, witness, had been what was called a scratch
14 boss for eight months and was supposed to act as foreman when the foreman was not around, and he knew what the duties of a foreman were. Witness was asked to state what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges and state what are the duties of a foreman with regard to seeing that a bridge is clear of obstruction when a train approaches. To which defendant objected as calling for a conclusion and opinion of the witness and not a fact. Which objection was overruled and defendant excepted. Witness answered that if the foreman was expected to do anything to a bridge that would injure a train he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he has got out the flags. Witness was asked what was his duty with reference to seeing that the bridge was clear, which question was objected to by defendant as calling for a conclusion and opinion of the witness and not a fact, which objection was overruled and defendant excepted, and witness answered that it would be the same thing, that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

On cross-examination, he testified that he was not at this time working for the railroad company; that his relations to plaintiff were friendly and that he had no bias in the matter. At the time of the accident they had been (at) work on the bridge about an hour or an hour and a half. That the track approaching the bridge from the west was about level but that about half a mile to the east of it there was a long hill called the Aledo hill. That right at the approach of the bridge there was a dump some four or five feet high; that the dump was wide enough for a man to stand away from the track and let a train pass by. That he saw some men on the bridge as the train passed and they stepped on to the sides of the bridge; that there was room enough on the sides of the bridge for a man to do this. That it was a usual matter for men to be working on a trestle and step out of the way and let a train pass. Carlin was on the north side of the bridge standing on the ground and in this position his waist would have been about level with the trestle which held up the track. That Carlin was fastening a clamp on the

ties to file saws. That the maul was an iron concern with a handle about three feet long, the hammer being six, eight, or probably ten inches in length and the handle went into the middle of the hammer, which had a double face. He saw Ed. Carver using it 10 or 15 minutes before train came. He was asked if Line was anything but a bridgeman himself and he said, Yes sir, he was a foreman, that he was a bridge carpenter and when he was wanted to superintend anything the foreman put him in charge of it. He was asked if it was not a fact that when they worked under Welsh, Line would do the same work as the witness, and he said No, if Line wanted to work he did, and if not, he did not work. That the foreman was supposed to put out flags when they needed them but that nobody else had the right to put them out; they were working under Walsh, who was the foreman; that they did not always send a man back to put out flags, but that it depended on the character of work which they were going to do. If the work on the bridge was of such a character as would be liable to make it weaker, they would send a man back, and if they were going to tear up a bridge any they were supposed to put out a flag, but if they did not, it was not necessary to put out flags. He was asked what he meant by saying it was the duty of the foreman to see that the bridge and track were clear, and he answered, to see that there was no obstruction there when the train came along if he had no flags out. He was asked if, while the foreman had flags out, and had time to clear the track were not the men also supposed to see that the track was clear, and he said Yes. He said also, that the foreman could not be at every place and he was asked if it was not anybody's business to see that the track was clear and he answered Yes, but it was his, the foreman's business to see that they did it. He was asked, "Suppose the foreman is under the bridge when the train comes along," and he answered that it did not shut him off from attending to his business, but he could not see if he was under the bridge. He was then asked the following question: "Then you would not rely, when working on a bridge, on the foreman to see that it was clear all the time," and he answered "No sir, and if I was a foreman I would not rely on the men all the time." He was then asked, "But you relied on each other," to which he answered, Yes, sir. He was asked if men working on and using material or anything on the bridge out on the track, when they got through with it, what they were supposed to do with it, and he answered, They were supposed to put it out of the way.

On redirect examination he said he did not know where Welsh, the foreman, was when the train came along, nor did he know where Line was.

Welsh put plaintiff to filing saws. That if the foreman had no flags out it was his duty to see that bridge is clear; that it is his business and is what he is for. That he himself had been a scratch boss and knew the duties of a foreman.

16 CHARLES NICHOLS, witness for plaintiff, testified:

At the time of the accident he was a bridge carpenter working for the defendant company and was in the same bridge gang as the former witness. That he remembers when the freight train came along, about the time Carlin got hurt. The freight train came from the west, running about thirty miles an hour. That he was standing about 150 feet east of the bridge when he first saw it. That he had gone there to get a piece of timber to use as a side brace for the scaffold. That he had been on the bridge before. That before the accident he had seen Ed. Carver out on the bridge using the spike maul, that he had left the bridge and gone out onto the track a minute or two before the accident, and Ed. Carver and the foreman were the only men on the bridge. That Welsh was on the bridge somewhere near the approach to the east end. That Ed. Line first called his attention to the train; that he heard no noise. That he and Line went out to pick up a piece of timber and had started back when Line said "Let's put this down and let the train go by," which was the first notice he had of it. The train at the time was nearly on the bridge. That he did not notice what the men on the bridge were doing at the time and did not hear any notice or warning given to them. That the curve west of the bridge was close, lacking but a few feet of being a mile from the bent of the bridge to the curve. That the train approaching did not make much noise.

The witness also testified that after the train passed that he noticed Carlin lying on the ground on the north side of the trestle and went down to see him and found his leg crushed or injured. He was asked how many men he left on the bridge with the foreman when he went off to get the piece of timber and he answered he did not know but one of the men was Ed. Carver and he did not know whether the foreman was on the approach or bridge bent and he did not know whether Ed. Carver stayed on the bridge when he went out to get the timber. That the place where Carlin fell was about twenty feet from the bridge span and several feet north of the bridge.

Witness then testified of assisting to carry Carlin up to the station, summoning a physician, etc.

He testified that the weight of the spike maul was about ten pounds, and described its appearance as given by the former witness. He testified that frequently when men were on the bridge and a train approached, the men would step out on one side to the caps of the bridge and allow the train to go by. The caps are

17 pieces of timber under the stringers and hold the stringers up, and the stringers were long pieces on which the ties rest parallel to the rails. That this was a combination bridge, being iron and wood. That the work they were doing on it was to strengthen it. That they drove piling inside the span and were capping it to strengthen the bridge. He was asked, Where work of that character was being done, what was the duty of the bridge foreman as to putting out flags and he said The foreman usually put out slow flags or had slow orders on the bridge by the dispatcher. The slow flag was a green flag stuck up by the side of the track.

and, in railroad parlance, meant for the trainmen to get the train under full control, so they could stop in a short distance if necessary. He was asked What was the duty of the foreman with reference to seeing the bridge was clear before the train approached and he said It was every one's duty, each man was to clear up the bridge when the train was coming, and it was the foreman's duty to give orders and he was supposed to give orders and see that the track was cleared up. He was asked if anything was left on the track whose duty it was to see that it was cleared away from there, and he said the foreman's.

On cross examination he said it was customary with all gangs that he had ever worked with, and he had been bridging about twelve years, for the foreman to see that the bridge was cleared, and that he gave it as his opinion from what the foreman usually did. That bridge carpenters were men of good intelligence. He was asked that if the foreman did not give the order and he, witness, was working on a bridge when a train came along and he saw a piece of timber lying across the track, would not he, witness, take it off and not wait for the foreman to give orders, and he answered that he was supposed to give orders to clear up the bridge, and he, the foreman, would not know whether any of the men saw a piece of timber or obstruction or not, but he was supposed to be standing around and give the men work to do and keep everything safe. He was asked to suppose he and another man were carrying a piece of scantling to a position on the track and if a train was coming, would they or anybody else sit down and wait for somebody else to tell them to throw it off, and he said no, they would not wait, but if they were working and had a timber lying clear across the track and saw a train coming they would throw it off. He was then asked if the bridge foreman had to be at work and watch all the men, to which he answered Yes. He was then asked if the foreman had to see that the work was being done right all the time, and he said No, not necessarily, but he could stand up above and give his orders as well as not, but did not do that all the time. He was
18 asked to suppose the foreman was down below when the train came along and he said that he was supposed to have the bridge clear, or have slow flags out, but that if he had not flags out to have everything cleared before he goes below. He was asked, Supposing a man is using a maul and he, the foreman, wanted to go below, would he, the foreman, be supposed to tell the fellow that was using the maul where to put it when the train came along, and he said No, but if a man has a tool in his hand he is supposed to put it out of the way where it would not be run over. He said oftentimes they would keep a hand car, or push car, on the bridge, and when they had it out there and a train would come along the foreman generally gave orders to run it off. He was asked if two or three men were on the bridge with the hand or push car, and the foreman was down below, and a train was coming, if they would wait for orders to run it off, and answered, The men were supposed to clear everything safe, but the foreman was supposed to see that they did it and if the foreman was not there he always put

a man in charge over them. That the foreman was in charge that morning himself. That Line was there that morning and was working the same as the rest of them. That he had no control over the men, but had been running an extra gang, but on that particular day he was just the same as the rest of the men.

With reference to putting out flags, he said if slow orders were given they did not put out flags every time they worked on a bridge, but it depended on the character of the work they were going to do, and it was the foreman's business to determine whether it was necessary to put out flags or not. The flags were put out in order to keep a train from coming on the bridge where it might be weakened by reason of the work or when they were unloading a car of timber on the bridge, which they sometimes did, and sometimes they had the bridge jacked up changing timbers, but if they did not have any heavy timbers on the bridge or anything that could not be handled in a reasonable time they just put out slow flags. That if the men were just working round there and the bridge was not weakened in any way, they did not put out slow flags.

On redirect examination he said it was not peremptorily required to have out slow flags when the hand car was on the bridge. Also, that when he left the bridge to go after the timbers he could not say where Welsh was but was somewhere near the approach of the bridge. That there were no flags out that morning.

The surface of the bridge was plain, that is, the ties were
19 about 8 inches apart and there was nothing on top of them except the rails and the guard-rails, the rails were of ordinary size, the guard-rails were about 10 inches from rails and parallel with them, the guard-rails were 8 inches across or wide and stood up about 4 inches above ties, they were let down over the ties about 2 inches, they were of wood. The length of span was about 60 feet, a bent is 15 feet, the east approach consisted of two bents.

MICHAEL CARLIN, plaintiff, testified:

That he was fifty-five years old and a member of the bridge gang under George Welsh, working near Aledo tank bridge in Sept., 1898, at the time he was hurt. He had previously been working under Line, but on the day in question Welsh was foreman. He thinks they were preparing to put in some false work on the bridge to strengthen it, but just after they got there some one ordered him to file some saws and was attaching a clamp to the bridge for this purpose when he was hurt. He was about twenty-six feet from the bridge at the time. He happened to look up and saw the train approaching, being right at the end of the bridge at the time. The train was moving very rapidly and he started to walk away from the bridge while the train passed. He was facing north, away from the bridge and had taken three or four steps when something struck him, but don't know what, striking him between the knee and ankle, breaking the bone, and because of which he was taken to the hospital at Fort Worth, where he remained confined for some time and where his leg was amputated above the knee. He stated that he was a bridge carpenter and had been for years. Here witness was

asked if he had been a bridge foreman and what his services as a bridge foreman were reasonably worth, to which defendant objected. Objection was overruled and defendant excepted, when plaintiff answered his services were reasonably worth $4.50 per day, but that he was earning at the time of the accident $2.40, which were the lowest wages he had worked for for several years. He did not know where the foreman was when he was hurt, or just previously. He stated that it was the duty of the bridge foreman to see that the track on the bridge was clear and nothing on it if a train was seen approaching. Witness does not believe that any flags were out at the time of the accident, but states it is owing to the character of work to be done whether flags should be put out or not, but on being asked what was the duty of the foreman in view of the character of work about to be done on this bridge, as to putting flags out, he answered it was the duty of the foreman to have slow flags out anyway for the safety of the men. About twelve or fourteen men were working on the bridge at the time. Witness states that a man with one leg cannot follow the occupation of bridge carpenter.

On cross-examination witness stated that he had been working for the T. & P. about a month and had been employed by Mr. Welsh. Before that had been working between Fort Worth and Whitesboro and had also done a little work for the Ft. W. & R. G. He stated he quit voluntarily when working for the T. & P. from Fort Worth to Whitesboro and thought he was as active as any of the men. He said after he got off at this bridge he helped carry some plank before he was ordered to file saws, and had been working but a short time before he was hurt. That he carried the plank from near the tank out to different places on the bridge, but when I went to file saws did not see any plank on top of the bridge.

The work that morning was what is called substructure work underneath the bridge, and so far as he knew would not weaken the bridge at all, but was intended to strengthen it. Witness states that sometimes in work of this kind flags are put out, but that they are intended to be used only when the track is obstructed or the bridge weakened, and then it is the custom to send a man out each way, but if the men were simply working on top of the bridge no flag would be out. The men on top are supposed to be on the lookout for trains of course.

That when a man is using a tool, such as a hammer to drive spikes, he is supposed to put it out of the way when he has finished with it, and an old experienced bridgeman will do it, but it is the business of the foreman to watch a green man.

The foreman is supposed to have supervision of the work and to be at various places. As a rule the men have not interest enough to see that everything is clear and the foreman should be in a position to watch. In my experience as a bridgeman I cannot recollect of but one man that was hurt while below the bridge by a passing train. I have seen men every day working on top of the bridge step to one side and get out of the way when a train would come and we must expect trains at any moment and be ready for them. If we

were working on timbers near the bridge we would not expect to have a slow order or flags out. Witness states that he heard no warning of the train coming but saw it himself. Witness also states that, being to one side of the bridge, he would be as much on the lookout for trains as a man on top of the bridge. Witness states he never felt any swimming in his head on account of being on high bridges. It is a rare thing for men of my age to be working
21 on bridges and as a rule they have younger men. In answer to question by the court as to whether it is the duty of men on the bridge to see that the track is clear for a coming train, witness states it is their duty.

E. M. CARVER, witness for plaintiff, testified:

Witness testified he remembered the accident to Mr. Carlin and that he had been a member of that gang about three months and had been a bridge carpenter about a year. That he had been assisting to put some braces on the side of the bridge that morning and when the train passed he was beside the bridge near the east end, standing on the ground, and had been there but a few minutes. That at the time the foreman was standing on the side of the bridge. Just prior to that time he (witness) had been working on the north side of the track near the east end of the bridge, about ten feet from the end of the approach, that he and the foreman were the only persons on the bridge. After the witness nailed the last piece of timber on the bridge he got down on the ground and was about ten feet from Mr. Carlin and had been there not over three or four minutes when the train passed. That he had been using a top maul driving spikes that morning but don't remember where he had put it down when he finished using it, but was always careful to put it out of the way so there would be no accident. He stated he would not be sure that he had the top maul or the spike maul, but was pretty sure it was the small maul, that you can handle with one hand. Witness states he saw the maul lying near Mr. Carlin after the accident and that he had seen it before that morning lying on the bridge; that the handle was broken off after Mr. Carlin was hurt was found that way, broken off near the head.

Witness testified as to going with plaintiff as did the first witness, securing a physician, etc.

Witness assisted, after he finished bracing the bridge, to handle some timbers. That he got to plaintiff first after he was hurt. That he did not remember of seeing any one else on the bridge by the foreman at the time. Witness described the spike maul as did the former witnesses and says a top maul is a smaller hammer that can be used with one hand, but cannot say for certain that he saw both of these mauls on the bridge that morning.

On cross-examination he stated that he was using one maul but was not sure which one it was. He nailed the top of the brace just below the stringer and were preparing to put a scaffold on the bridge to work on. That he could not say where the maul he was
22 using had been left. That he had been working somewhere near the west end of the trestle where it joined the bridge.

That the place he got from the trestle to the ground was about two and three feet high. When he got off the bridge, as well as he remembers, the foreman — standing at the east end of the bridge and then walked toward the trestle at the west end, and when the train passed was standing on the bridge on the south side. Witness stated he was not now in the employ of the defendant, but at the time of the accident was working as a bridge carpenter. His attention was first attracted to the train by its noise. The train can be seen about 200 yards from the west end of the bridge, looking west, but in reply to the question witness says he don't know much about it.

I. E. LINE, testified for defendant:

That he was a member of the same bridge gang with Carlin when he was hurt and had known him about a month. That previous to this time he had been in charge of part of the gang but on this particular day was working under Welsh the same as the rest of the men, and would be classed as a bridge carpenter. The grade of work they were doing on the bridge was called putting in false work and its purpose was to strengthen the bridge, but it did not weaken it while the work was in progress. The bridge was a combination iron and wood structure and consisted of an approach or trestle and the bridge proper. That the character of the work they were doing did not disturb or obstruct the track in any way and they were not going to move or repair the rails in any way. All the work that was being done on the top was to carry boards out and fix scaffolding to the side. Witness states he was about one hundreds yards east of the bridge when the train came, going after some timbers with others. Looking west from that bridge witness states a train can be seen for about a mile as it is a straight track for about a mile to the curve. There had been a spike maul or hammer used there that morning and witness states he used it himself just before he went out for the timber for the scaffold. He states he was using it on the south side of the bridge for putting up the staging or scaffold. When he finished he handed it to some one on top of the bridge who handed it to Mr. Carver on the north side of the bridge to spike on a brace. Witness states he does not recollect of seeing any other spike maul or hammer there that morning than the one he used which was the regular spike maul described by former witnesses. Here witness testifies as to finding of maul after the train passed as did other witnesses. Witness states he has been in the
23 bridge business for eight years and from his experience he stated, taking into consideration the character of work being done that morning that it was not customary to have out slow flags for it, nor was it customary to have a flag out to stop a train for that character of work. Witness stated they hardly ever put out slow flags and only did it when they were doing work of such character that they could not get the bridge clear in a few minutes or doing work that would require the train to cross the bridge slowly or when the track was disturbed. Ordinary trains make the same rate of speed over bridges as the other parts of the

track unless slow orders are out. The train was going, to the best of his judgment, about twenty-five miles an hour.

On — examination he stated he did not particularly notice the speed of the train. That they had been using a push-car to take some timbers out on the bridge, but don't remember whether it was before or after the accident. Referring to slow flags, witness states that he had never known in his experience but once when a slow flag was stuck by the side of the track, but that when they were to be used a man was always sent back with a red flag and torpedoes. The engineer is supposed to stop if he runs over two torpedoes. Witness states that he does not know what a blue flag is used for and the bridgemen do not use it at all. The regular slow flag is a green flag. That he never heard of any rule requiring slow flags to be put out when timbers were being handled on the bridge. There were several men working up at the east end of the bridge, and Carver among them. The witness stated the train was about a quarter of a mile from him when he first saw the train.

ED CARVER, recalled by defendant, testified:

That he testified on the former trial of this case and does not recollect that he testified about using a spike maul but on examination of statement he furnished to defendant at time of accident says it was a spike maul that was being used and it must have been the one that was found near Carlin.

F. J. HUNTOON, stenographer, stated:

That he reported this case at the former trial and on reference to notes of that trial says that witness testified at that trial that he had seen a spike maul that morning but did not remember whether he used it or not, but thought he did.

24 GEORGE WELSH, witness for defendant, testified:

That he was the bridge foreman of the T. & P. R'y Co. and was in charge of the work the morning the plaintiff was injured. Witness testified as to character of work on the bridge the same as former witness. Also as to distance a train could — been seen west of the bridge. That he was about the middle of the first span when he saw the train coming; that he will not be positive whether there were any others on the bridge or not but thinks one or two others were. When he saw the train coming he looked up and down the track to see if everything was clear, did not see anything and stepped to one side when the train was three or four hundred yards from him. He states he would have had plenty of time, if there had been anything on the bridge to have gotten it off. He does not recollect seeing any one using the spike maul that morning. That he was foreman and had been around all parts of the bridge, both on top and underneath it. That Carlin was preparing to file saws when he was hurt. That there was no flag out that morning, as it was not necessary, the track was not obstructed, all the work being down below. When a man is using tools and gets through with them he is supposed to put them out of the way where a train will

not strike them. The foreman is liable to be anywhere about the bridge at any time and cannot be depended — to be at any place, but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time and we do not know when one is liable to be along. Witness says slow flags are very rarely used. He did not see anything fly toward Mr. Carlin, but did see him fall but some of the men got there before he did. The train was going, to the best of his judgment twenty-five or thirty miles an hour.

On cross-examination witness stated they did not carry any heavy timbers out on the bridge that morning as it was not necessary, but they would carry the staging planks out on the dump and then underneath the bridge. We had no car but the section foreman had one and we may have borrowed it from him to carry some timbers out, but I do not recollect now and cannot say. That the slow flag is the blue flag and the green flag is not used in the bridge department. That he did not consider it necessary to put out slow flags that morning as the track was not obstructed. That he never uses slow flags but always uses the red flag to stop a train. At the time he had been bridge foreman nearly a year. When timbers are being carried on a bridge it is left with the foreman as to putting out flags, and he does not do it unless he thinks he cannot clear the track in a very short time. That when he first saw the train he called that fact out and examined the track.

On redirect examination witness stated he was about fifty or sixty feet from plaintiff when he fell. Witness also testified that as bridge foreman he had employed Carlin and had supervision over him and had power to employ and discharge him as well as all of the other bridgemen who were working there on that morning.

F. W. Race, witness for defendant testified.

That he was the engineer of the train which crossed the bridge when Carlin was hurt. That he had been running over that part of the road for nearly eighteen years. That the curve west of the bridge is about three-quarters of a mile distant. The track there is about level but inclines a little to the east. That the track east of the bridge is straight about a quarter of a mile, and then a curve commences and also the hill called Aledo hill. That he did not see or notice anything on the track that morning as he approached the bridge.

On cross-examination he stated that he had no recollection of the injury to Carlin but that it was brought to his attention some days afterwards. That he did not know what speed he was running when he approached the bridge that morning. When we see slow flags we are supposed to get our train under full control. Slow flags are blue flags by side of the track and the red flag is the danger signal, when we come to a stop. It is an unusual thing for slow flags to be put out, the red flag being usually used. Witness states that he does not recollect of any time that he ever saw a blue flag

out for men working on a bridge, but often have it for men working on the track, in a department different from the bridge department. Witness is asked if it is not customary or usual when work is being done on a bridge for engineers to be informed of the fact by the company, to which he answered that whenever the bridge gang is working on a bridge and they are going to have the bridge in such condition that it is not safe to pass over it at a high rate of speed, they generally notify the dispatcher's office and he gives a slow order over it, when it is not necessary to put out flags. We did not have a slow order over this bridge at this time. He states that they do not slow down and run cautiously upon a bridge when they see men working about it, unless they have a slow order.

The above is a full, correct and substantial statement of all the evidence in the case and after the same had been introduced,
26 before the *court* and the court, the court, after defining to the jury the issues made upon the pleadings in the matters to be submitted to the jury, charged the jury as follows:

1. That the burden of the proof was upon the plaintiff and he must establish by a preponderance and greater weight of evidence, that the defendant was negligent and that the plaintiff was injured thereby, and the extent of his damages, and that if they found defendant was not negligent, they should render a verdict in its favor.

2. "The defendant is bound to exercise ordinary care to furnish a reasonably safe place within which employés can perform their duties. This care to be exercised depends upon any apparent danger there may be. The defendant is not bound to exercise extraordinary care, but only ordinary care, to keep its premises in a safe and good condition. Ordinary care is defined in law as such care as a person of ordinary prudence might be expected to exercise under similar circumstances. More than this the law does not require, but less than this is negligence. Or, in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit, or in doing something which an ordinar-y prudent man would not do under similar circumstances."

3. "The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company. The negligence of which plaintiff accuses defendant consists in the failure on the part of the foreman of said bridge gang to use ordinary care to remove, or to see and remove the spike maul before the arrival of said train at said bridge."

4. "If you believe from the evidence that the spike maul testified about was left on the bridge by a fellow-servant of plaintiff, and you further believe from the evidence that at the time the train approached, the foreman of said bridge gang was the only person upon said bridge, and that he could, by the exercise of ordinary care, as I have defined same herein, have seen said spike maul and removed same from the track and from proximity thereto, if you believe it was on the track or in proximity thereto, and if you further believe it was the duty of such foreman to use such care to see that the track was clear and no obstruction on the track, or so near it as to be

struck by a passing train, and if you further believe said foreman did not use such care and that said spike maul or hammer was struck by said train and hurled against said plaintiff and caused him said injuries and if you further believe that it was negligence of the foreman in failing to see and remove said spike maul,
27 if you find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you should find for the plaintiff."

5. "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it would be your duty to find for the defendant."

6. "If you should find that the defendant, through the foreman of the bridge gang, was guilty of negligence, you must also find that the negligence of the foreman was the proximate cause of the accident and injury to plaintiff. And you are charged that an act of negligence is the proximate cause of an injury, if the act of negligence contributed to cause the injury, and was such an act that an ordinar-y careful and prudent man could and would have anticipated the causing of the injury under the facts and circumstances existing at the time and which were known or could have been known to him by the exercise of ordinary care had he been in the foreman's place and stead; and it is not necessary in order to constitute an act of negligence, to proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the particular person hurt would be hurt nor that the accident or injury should happen or occur in the particular manner in which it did occur."

7. "On the other hand, the defendant company should not be held responsible for the consequences of an act of negligence, which consequence ought not reasonably to have been foreseen. In other words, it ought not to be deemed actionable negligence to fail to do an act when it was not anticipated and should not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to any one. To require this would be to demand of human nature a degree of care incompatible with the prosecution of the ordinary avocations of life."

At the request of defendant, the court gave the following special charge, being special charge No. 6:

"The jury are instructed that the bridge foreman in making his examination of the track as the train approached, to see if any obstructions were upon it or near it, had the right to take into consideration that it was the rule and instructions for all persons using tools to so leave them as not to be in danger of passing trains,
28 and in determining whether or not the foreman was negligent; they should take this fact into consideration."

The defendant asked the court to give also the following special charges:

Special charge No. 1. "In this case, the jury are instructed that

under the law and the evidence, plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

Special charge No. 2. "In this case, the jury will not consider as elements of negligence the rate of speed at which the train may have been running or the fact that the bridge foreman did not have any flags out on that occasion, and they will, therefore, eliminate these matters from their determination of the liability of defendant in this case."

Special charge No. 3. "The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul was negligence; that is, he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

"They must also find that such negligent act was the proximate cause of the injury; that is, that the injury was the natural and probable consequence of the negligent or wrongful act and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is when it is more likely to follow this supposed cause than it is to fail to follow it.

"Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the foreman in failing to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for defendant."

Special charge No. 4. "The court instructs the jury that the burden of proof is upon the plaintiff to show negligence and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

Special charge No. 5. "If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or
29 track, and that this act of Carver was the direct and proximate cause of the accident, they will then find for defendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

Special charge No. 7. "Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty — may be expected to be performed by any one of the men, irrespective of his grade or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welsh in this respect was one which existed between fellow-servants and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

Special charge No. 8. "The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

Special charge No. 9. "If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then, in such event, the jury should bring in a verdict for defendant."

All of which said instructions were properly signed by the attorneys for the defendant, and the same were refused by the judge presiding and filed by the clerk in this cause, whereupon the attorneys for the defendant, in open court and before the jury had withdrawn from the bar or left the jury-box, made the following exceptions to the charge given by the court:

1. It excepted to that part of the charge set forth in paragraph 2, wherein the court defined ordinary care as such care as a person of ordinary prudence would be expected to exercise under similar circumstances.

2. It excepted to the definition of negligence given by the court in said paragraph, wherein the court defined negligence to consist in omitting to do something which an ordinar-y prudent man would — admit, or in doing something which an ordinar-y prudent man would not do under similar circumstances.

3. It excepted also to the charge of the court as set out in paragraph three, wherein the court charged the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

4. It also excepted to the charge of the court as set forth in the fifth paragraph, wherein the court charged the jury if they found, from the evidence, that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury to plaintiff, then and in that event, it would be their duty to find — the defendant.

5. The defendant also excepted to the refusal of the court to give special charge No. 1.

6. The defendant also excepted to the refusal of the court to give special charge No. 2.

7. The defendant also excepted to the refusal of the court to give special charge No. 3.

8. The defendant also excepted to the refusal of the court to give special charge No. 4.

9. The defendant also excepted to the refusal of the court to give special charge No. 5.

10. The defendant also excepted to the refusal of the court to give special charge No. 7.

11. The defendant also excepted to the refusal of the court to give special charge No. 8.

12. The defendant also excepted to the refusal of the court to give special charge No. 9.

The jury retired and after consideration of the evidence and the charge of the court, returned a verdict, which is copied in the record, and defendant filed motion for new trial, which was overruled by the court.

The foregoing bill of exceptions now being duly considered by the court on this first day of February, A. D. 1901, within the time allowed and granted by the court within which to file bill of exceptions, the same is hereby approved, signed and ordered to be made a part of the record herein.

EDWARD R. MEEK,
United States District Judge.

The foregoing has the following endorsement, to wit:

31 129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin *vs.* T. & P. R'y Co. Defendant's bill of exceptions. Filed 1st day of Feb'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Assignment of Errors.

Filed March 14th, 1901.

In the U. S. Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Now comes the defendant, Texas & Pacific Railway Company, by counsel and says that in the record of proceedings in the above-entitled cause there is manifest error, and files the following assignments of error:

1. There was error of the court in the second paragraph of the court's charge, wherein the court, in defining negligence instructed the jury as follows: "Or, in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit and in doing something which an ordinar-y prudent man would — do under similar circumstances."

2. The court erred in the third paragraph of its charge, wherein the court instructed the jury as follows: "The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company."

3. There was error of the court in the fifth paragraph of the court's charge wherein the court instructed the jury as follows: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in

charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then, and in that event, it would be your duty to find for the defendant.

4. There was error of the court in refusing to give special charge No. 1 requested by the defendant, which is as follows: "In this case the jury are instructed that under the law and evidence, plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

5. There was error of the court in refusing to give special charge No. 2, requested by the defendant, which is as follows:
32 "In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running or the fact that the bridge foreman did not have any flags out on that occasion, and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

6. There was error of the court in refusing to give special charge No. 3, requested by the defendant, which is as follows: "The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul was negligence; that is, he failed to do what a person of ordinary prudence would have done under like or similar circumstances."

They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is when it is more likely to follow this supposed cause than it is to fail to follow it.

Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then in such event, the foreman in failing to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for defendant.

7. There was error of the court in refusing to give special charge No. 4, requested by the defendant, which is as follows: "The court instructs the jury that the burden of proof is upon the plaintiff to show negligence and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

8. There was error of the court in refusing to give special charge No. 5, requested by the defendant, which is as follows: "If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for de-

fendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

33 9. There was error of the court in refusing to give special charge No. 7, requested by the defendant, which is as follows: "Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet if they find that the act of examining the track, as the train might be approaching for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty — may be expected to be performed by any one of the men, irrespective of his grade, or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event the act or duty of Welsh in this respect was one which existed between fellow-servants and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

10. There was error of the court in refusing to give special charge No. 8, requested by the defendant, which is as follows: "The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

11. There was error of the court in refusing to give special charge No. 9, requested by the defendant, which is as follows: "If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then, in such event, the jury should bring in a verdict for defendant."

12. The witness Ed. Carroll was asked what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions when a train approaches, to which question defendant objected as calling for a conclusion and opinion of the witness and not a fact, which objection was overruled and witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags. The court overruled the defendant's objection and allowed the evidence to be admitted, which was error.

13. The same witness was also asked by plaintiff's counsel

34 what was his duty with reference to seeing that the bridge was clear, to which defendant objected as calling for a conclusion and opinion of the witness and not a fact. The witness answered that it would be the same thing, that is to see that there was no obstruction and to see that it was clear at all times unless he had

flags out. There was error in the court in admitting this testimony over the objection of the defendant.

14. The verdict of the jury was against the evidence for the reason that it appeared from the evidence that the defendant's servants had exercised due care to discover any danger or any obstructions on the track.

15. The verdict of the jury was contrary to the evidence because it appeared that if there was any negligence at all, that it was the negligence of a fellow-servant of plaintiff.

16. The verdict of the jury was contrary to the law and the evidence in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track was not the proximate and direct cause of the accident.

17. The verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the negligence of Ed. Carver in leaving the hammer on the track, and the defendant could not have reasonably anticipated that such would have been done.

T. J. FREEMAN,
F. B. STANLEY,
M. A. SPOONTS,
GEORGE THOMPSON,
Attorneys for Defendant.

The foregoing has the following endorsement, to wit:

129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin vs. Texas & Pacific Railway Company. Assignment of errors. Filed 14th day of March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Petition for Writ of Error.

Filed March 14th, 1901.

In the Circuit Court of the United States for the Northern District of Texas.

35 MICHAEL CARLIN vs. TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Petition for writ of error.

To judges of the circuit court of the United States in and for the northern district of Texas, at Fort Worth, November term, 1900:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, respectfully represents:

That at said term of said court, to wit: on the 11th day of December, 1900, the said Michael Carlin recover against petitioner, The Texas & Pacific Railway Company, judgment for the sum of

$6000.00, with interest from the date of the judgment and costs of suit, in the proceedings for the recovery of which and in the rendition of which there was and is manifest error to the great prejudice of petitioner; that plaintiff resides in the State of Texas, in Tarrant county, that his attorneys of record are E. C. Orrick and J. C Terrell, Jr., residents of Tarrant county, Texas.

That petitioner has filed in this court its assignment of errors and here presents same for the inspection of the court.

Wherefore, petitioner prays that it be granted a writ of error to remove said judgment and proceedings had in said cause to the United States circuit court of appeals for the fifth circuit to be held at New Orleans, Louisiana, for revision, correction and reversal; and your petitioner will ever pray.

T. J. FREEMAN,
F. B. STANLEY,
M. A. SPOONTS,
GEORGE THOMPSON,
Attorneys for Petitioner.

Allowed:
EDWARD R. MEEK,
United States District Judge.

The foregoing has the following endorsement, to wit:

129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin *vs.* Texas & Pacific Railway Company. Petition for writ of error. Filed 14th day of March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

36 *Writ of Error Bond.*

Filed March 14th, 1901.

In the Circuit Court of the United States for the Northern District of Texas.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Writ of error bond.

Know all men by these presents: that we, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, as principal, and —— —— and —— —— as sureties, are held and firmly bound unto Michael Carlin, in the sum of ten thousand dollars, to be paid to said Michael Carlin, his executors, administrators or assigns, to which payment, well and truly to be made we bind ourselves our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, using scrolls for seals and signed with our names, this the — day of ——, 1901.

The condition of the foregoing obligation is such that.

Whereas: lately at a term of the circuit court for the northern district of Texas, at Fort Worth in a suit pending in said court between Michael Carlin, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 129 on the docket of said court, a judgment was rendered on the 11th day of December, 1900, that the plaintiff, Michael Carlin, should have and recover of the defendant the sum of $6000.00, with interest thereon at six per cent. per annum from date of the rendition, as well as all costs of suit, and motion for new trial was overruled on Jan. 14, 1901, and

Whereas, the Texas & Pacific Railway Company has obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse said judgment, and also a citation directed to said Michael Carlin, and his attorneys of record E. C. Orrick and J. C. Terrell, Jr., citing and admonishing them to be and appear at the United States circuit court of appeals to be holden at New Orleans, within thirty days from the —.

Now, if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs,
37 if it shall fail to make good its pleas, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By STANLEY, SPOONTS & THOMPSON,
Its Attorneys.

EDW. O. TENISON,
C. R. BUDDY, *Sureties.*

Approved as a supersedeas bond:

EDWARD R. MEEK,
United States District Judge.

The foregoing has the following indorsement, to wit:

129. U. S. circuit court, northern district of Texas. Michael Carlin *vs.* T. & P. R'y Co. Writ of error bond. Filed 14 day of March 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Michael Carlin, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, in not exceeding thirty days from 14th day of March, 1901, being the date of issuance of the citation herein, in the United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further
38 to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and one.

[SEAL.] J. H. FINKS,
Clerk of the Circuit Court of the United States for the Northern District of Texas,
By J. B. FINKS, *Deputy.*

Allowed by:

EDWARD R. MEEK,
United States District Judge.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, this 14th day of March, 1901.

J. H. FINKS, *Clerk,*
By J. B. FINKS, *Deputy.*

(Indorsed:) No. 129. Michael Carlin *vs.* Texas & Pacific Railway Company. Writ of error. Filed 14 day of March, A. D. 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Michael Carlin and Messrs. Orrick & Terrell, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the fifth circuit, to be held at the city of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of the United States for the northern district of Texas, wherein The Texas & Pacific Railway Company is plaintiff in error and Michael Carlin is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 14th day of March, A. D. 1901, and of the Independence of the United States the 125th year.

EDWARD R. MEEK,
United States District Judge.

39 We hereby acknowledge service of above citation in error.

ORRICK & TERRELL,
Attorneys for Michael Carlin.

(Indorsed:) No. 129. Michael Carlin *vs.* Texas & Pacific Railway Company. Citation. Filed 14 day of March, A. D. 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

List of Papers for Transcript.

Filed March 14, 1901.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

The following papers are to constitute the record on appeal in the case of Michael Carlin *vs.* Texas & Pacific Railway Company, to wit:

1. Plaintiff's first amended original petition, filed December 10th, 1900.
2. Defendant's amended answer filed December 10th, 1901.
3. Judgment.
4. Amended motion for new trial.
5. Order overruling motion for new trial.
6. Order extending time in which to file bill of exceptions.
7. Bill of exceptions.
8. Petition for writ of error.
9. Assignment of errors.
10. Writ of error bond.
11. Writ of error.
12. Citation in error.
13. Clerk's certificate.

ORRICK & TERRELL,
Attorneys for Plaintiff.
STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

The foregoing has the following indorsement, to wit:

129. Michael Carlin *vs.* Texas & Pacific R'y. Co. Filed this 14th March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

40 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States, in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors, and all proceedings in cause No. 129, wherein Michael Carlin is plaintiff and The Texas and Pacific Railway Company is defendant, except that the original writ of error and original citation in error are included therein, instead of copies thereof, as fully as the same remains on file and of record in my office, at Fort Worth, Texas.

Witness my hand officially, and the seal of the United States circuit court for the northern district of Texas, at Fort Worth, Texas, this the 26th day of March, A. D. 1901.

[SEAL.]

J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy*.

41 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1901.

WEDNESDAY, *May* 22, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY
vs.
MICHAEL CARLIN. } No. 1048.

This cause was regularly called this day, and submitted to the court after argument by Geo. Thompson for plaintiff in error, and by E. C. Orrick for defendant in error.

42 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

NOVEMBER 19, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of

error bond herein, Edw. O. Tenison and C. R. Buddy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

43 (Original Filed Nov. 19, 1901. Charles H. Lednum, Clerk.)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 190–.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

Error to the circuit court of the United States for the northern district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

The opinion will state the case.

Mr. T. J. Freeman, Mr. F. B. Stanley, Mr. M. A. Spoonts, and Mr. George Thompson for plaintiff in error.

Mr. E. C. Orrick and Mr. J. C. Terrell, Jr., for defendant in error.

SHELBY, circuit judge, delivered the opinion of the court.

This is an action for damages for personal injuries brought by Michael Carlin, plaintiff, against The Texas & Pacific Railway Company, defendant. The petition alleged that the plaintiff was in the employ of the defendant as a member of what is known as the bridge gang; and, while at work near where a bridge was being repaired, a train approached with great speed, and as it ran over the bridge a spike maul or heavy iron hammer, weighing six or eight pounds, with a handle attached to it, was caught by the train and thrown against the plaintiff, injuring his leg so that it had to be amputated. The negligence of the company was charged in several ways, one being that the foreman of the bridge gang had failed to see and remove the maul from the bridge. The defendant's answer contained
44 a general denial; and a plea that, if there were negligence, it was that of a fellow-servant of the plaintiff, for which the defendant was not liable; and that the plaintiff was guilty of contributory negligence. The case was tried on these issues, and there was a verdict for the plaintiff for $6,000 damages, on which judgment was entered. A bill of exceptions was reserved by the defendant, and the case is brought here on writ of error.

The plaintiff in error contends that the trial court should have directed a verdict for the defendant. Several of the assignments of error are dependent on that contention and they are discussed together in the arguments submitted.

In every jury trial there is a preliminary question for the court. The court must determine whether or not there is sufficient evidence upon which the jury could base a verdict for the plaintiff. If there

is no evidence, or if it is such that on a fair construction does not sustain the plaintiff's case, and that no fair inference to be drawn from it sustains it, the court should give the peremptory instruction. There is no good sense in permitting a verdict that it would be the duty of the court to set aside. But it is not the province of the court to weigh the evidence and decide between conflicting statements of witnesses; or to decide what inference should be drawn from uncontradicted evidence if different minds could fairly come to different conclusions from it. A question of negligence dependent on evidence should not be taken from the jury except in cases where there is no material conflict and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

The plaintiff, Carlin, was one of several members of a bridge gang. Welsh was the foreman in charge and control of the gang. The
45 foreman and gang had gone to the bridge on the defendant's railway to repair it. Ed. Carver, one of the gang, used an iron maul or hammer about ten inches long, weighing six or eight pounds, to drive spikes in the bridge. It had a wooden handle about three feet long. Welsh, the foreman, directed the plaintiff to sharpen a saw. Pursuing their work under the direction of the foreman, all the men left the bridge. Welsh alone remained on the bridge. It was his duty to see that the bridge was kept free from obstructions, so that trains could safely pass. Where Carver laid the maul when he left the bridge is not shown by direct evidence. Ten or fifteen minutes after he was using the maul a train approached rapidly and crossed the bridge. Welsh says he looked on the bridge and saw no obstruction; that he did not see the maul. He stepped out of the way of the passing train. As the train passed, the plaintiff, who was more than twenty feet from the track, was seen to fall. His leg was broken so as to require amputation. Lying near him was the iron maul with the handle freshly broken. The conclusion is irresistible that the cars in passing had struck the maul, breaking the handle and hurling it against him.

One of the averments of negligence in the petition is that the company was negligent in that Welsh, the foreman of the bridge gang, failed to see that the bridge was clear of obstructions and in failing to detect the maul on the bridge and in leaving it there to obstruct the bridge.

In the absence of a controlling statute it may be conceded that Welsh, the foreman, and the plaintiff, a member of the bridge gang, would have been fellow-servants, and Carlin would have had no cause of action against the company. McDonald *v.* Buckley, 109 Fed. Rep. 290; New England Railroad Co., *v.* Conroy, 175 U.S. 323. But there are statutes in Texas applicable to the case. By these statutes, in a case like this, a servant or employé who has the authority to direct any other employé in the performance of any

duty of such employé, is a vice-principal, and not a fellow-servant.

By the express terms of the statute employés are not con-
46 sidered fellow-servants unless they "are in the same grade of employment, and are doing the same character of work or service and are working together at the same time and place, and at the same piece of work and to a common purpose." Sayles' Civil Statutes of Texas, 1897, arts. 4560*f*; 4560*g*; 4560*h*. The statutes are printed in the margin.

Marginal Note.

"Art. 4560*f*. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servant or employés were fellow-servants with each other shall not impair or destroy such liability.

"Art. 4560*g*. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this State, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employés of such person, receiver or corporation, or with the authority to direct any other employé in the performance of any duty of such employé are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employés.

"Art. 4560*h*. All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time
47 and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow-servants." Sayles' Civil Statutes of Texas, 1897, arts. 4560*f*, 4560*g*, 4560*h*.

It is clear that on the proof Welsh was in control and command of the plaintiff and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of work or service. Under the Texas statute, according to its letter, or as construed by the Texas supreme court, they were not fellow-servants. Long *v.* Chicago, R. I. & T. R'y Co., (supreme court of Texas). 57 S. W. Rep. 802; Nix *v.* Texas & Pacific Railway Co., 18 S. W. Rep. 571. We must be controlled by these statutes and their construction by the Texas supreme court. R. S. U. S.,

sec. 721; B. & O. Railroad *v.* Baugh, 149 U. S. 368. It follows that the company would be responsible to the plaintiff if he received the injuries from the negligence of Welsh.

The contention for the peremptory charge must be and is based on the idea that there is no proof of negligence on the part of Welsh. There is no conflict in the evidence that it was Welsh's duty to see that the bridge was not obstructed. He says he looked and saw no obstruction. It is claimed that there is no evidence as to the location of the maul when the train reached the bridge; that there is no proof that it was in sight; that if Carver had placed it where Welsh could not have seen it, that it was negligence in Welsh to fail to see and remove it. Negligence, like any other fact, may be proved by circumstantial evidence. The indisputable fact that the cars struck the maul and hurled it so that it struck the plaintiff, shows that the maul lay where the cars could strike it. Welsh was alone on the bridge as the train approached. It was proved that the surface of the bridge was plain; made with the cross-ties about eighteen inches apart, on which were the rails and the guard-rails, with nothing on them or near them to cover or hide the maul. When the evidence shows that the cars struck the maul on the bridge so
48 constructed, is not that a fact from which the jury might infer that it was lying in plain view, near the rail? If such inference be not unreasonable, the question was one for the jury.

We cannot adopt the suggestion or intimation that in cases like this, owing to the alleged inclination of juries to find against corporations, that we should assume that the jury has been influenced otherwise than by a consideration of the evidence. To adopt the expression of a distinguished judge, "we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." Jones *v.* East Tennessee &c. Railroad Co., 128 U. S. 443.

It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. Just such an occurrence was not to be anticipated. The defendant requested the trial judge to instruct the jury that although they may find that the foreman failed to discover the maul, "yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant." The court did not err in refusing to adopt this view of the case. It may be true that the accident in its extraordinary form, with its peculiar circumstances, could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected, cannot prevent

the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negli-
49 gence in this case produced an effect not before observed—the circumstances of which could not have been anticipated. But if it was negligence likely to produce other and familiar injuries, the peculiarity of the accident does not prevent liability. Doyle *v.* Chicago, St. Paul & Kansas City R. Co., 39 Am. & Eng. Railroad Cases, 314. The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first and perhaps the second injury occurring in such manner there could be no recovery, but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable.

It is contended that if Ed. Carver left the maul close to the rail or track, that this act of Carver's was the direct or proximate cause of the injury. It is true that, if the maul had not been placed near the rail, Carlin would not have been injured. But we do not think that this act of Carver's, conceding it to be proved, constituted the proximate cause of the injury. When he finished driving the spikes with the maul he would be expected to lay it down. The tools of the workman, and the material in use to repair the bridge, could only be rightfully on the bridge and on the track when no train was to pass. Sometimes they would necessarily be left for a short time on the bridge. They could be there without negligence on some occasions. It would, of course, be negligence to leave them on the track for a train to run over them. The fact that they were so placed on the track, the men negligently leaving them there, could not make it the less negligent for the foreman to fail to perform his duty to remove them or cause them to be removed. To illustrate: The gang might remove a defective rail on a bridge to put in a new one. If the foreman failed to put out a flag or to use or cause to be used other means to stop the train coming on the bridge while the rail was off—that being his duty—and an accident occurred, it could not be said that the act of the gang in removing the
50 rail was the proximate cause of the accident. The proximate cause of the accident would be the failure of the foreman to stop the train. Placing the maul on the bridge may have been an innocent act connected with its use. It may be conceded that Carver was negligent to leave it there. The fact, not disputed in evidence, that the duty was imposed on the foreman to see that the bridge was kept free from obstructions, shows that it was deemed unsafe by the company to rely alone on the men to voluntarily keep it free. Conceding the negligence of Carver, could that excuse or relieve Welsh from the performance of his duty? He was left alone on the bridge, and, as the proof tends to show, near the maul when the train was approaching. He had time to remove it. If he negligently failed to see it, or, seeing it failed to remove it, that was the negligence constituting the proximate cause of the accident.

The preceding act of Carver could not relieve the company of its responsibility for Welsh's failure to perform his duty.

We have carefully examined all the assignments of error, and find no reversible error in the case.

The judgment of the circuit court is affirmed.

51 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error.
} No. 1049.

Now comes The Texas & Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause, there is manifest error in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas and in holding that said court committed no error in the second paragraph of the court's charge, wherein the court, in defining negligence, instructed the jury as follows:

"Or in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit, and in doing something which an ordinar-y prudent man would — do under similar circumstances."

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in the third paragraph of its charge, wherein the court instructed the jury as follows:

52 "The foreman of the bridge gange was, under the evidence, the vice-principal of the defendant company."

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in the fifth paragraph of the court's charge, wherein the court instructed the jury as follows:

"If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which

directly and proximately contributed to the injury of the plaintiff, then, and in that event, it would be your duty to find for the defendant."

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"In this case the jury are instructed that under the law and evidence, a plaintiff is not entitled to recover, and they will therefore, find a verdict for the defendant."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running, or the fact that the bridge foreman did not have any flags out on that occasion and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any
53 failure on his part to discover the close proximity of the maul, was negligence; that is he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is, when it is more likely to follow this supposed cause than it is to fail to follow it.

Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances then in such event, the foreman in failing to discover the proximity of the hammer, would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for the defendant."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The court instructs the jury that the burden of proof is upon the plaintiff to show negligence, and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for defendant as it would not be lieble for any of the negligent acts of the said Carver, as he would be a fellow-servent of plaintiff."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"Although Welch, the bridge foreman may have been in law, the representative of the company, yet if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty, — may be expected to be performed by any
54 one of the men irrespective of his grade or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welch in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welch in this respect, if any there were."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool, would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination

of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipted, in view of the surrounding circumstances, then in such event the jury should bring in a verdict for the defendant."

XIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of the witness Ed. Carroll who was asked what were the duties of a bridge foreman with reference to signalling approaching trains when engaged in repairing bridges, and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions when a train approaches, to which question the plaintiff in error objected as
55 calling for a conclusion and opinion of the witness and not a fact, to which question the witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags.

—IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of Ed. Carroll who was asked what was his duty with reference to seeing that a bridge was clear, to which the plaintiff in error objected as calling for a conclusion, and opinion of the witness and not a fact, to which question the witness answered that it would be the same thing, that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

XV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was against the evidence, for the reason that it appeared from the evidence that the servants of the plaintiff

in error had exercised due care to discover any danger or any obstruction on the track.

XVI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was contrary to the evidence, because it appeared that if there was any evidence at all, that it was the negligence of a fellow-servant of defendant in error.

XVII.

56 The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was contrary to the law and the evidence, in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track, was not the proximate and direct cause of the accident.

XVIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the negligence of Ed. Carver in leaving the hammer on the track, and plaintiff in error could not have reasonably anticipated that such would have been done.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas and Pacific Railway Company, Plaintiff in Error.

Endorsed: No. 1048. The Tex. & Pac. R'y Co. *vs.* Michael Carlin. Assignments of error. Filed December 31, 1901. Charles H. Lednum, clerk.

57 Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto Michael Carlin in the full and just sum of twelve thousand (12,000) dollars, to be paid to the said Michael Carlin or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of the circuit court of the United States in and for the northern district of Texas and on December 11, 1900 in a suit depending in said court, between Michael Carlin, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against said railway company for the sum of six thousand dollars ($6,000) besides costs of suit; and

Whereas from said judgment the said railway company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit which court, on the 19th day of November 1901, rendered a judgment affirming the said judgment, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Michael Carlin or his attorneys of record citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
By GEORGE J. GOULD, *Pres't.*
GEORGE J. GOULD. [SEAL.]

Sealed and delivered in presence of—
D. D. DUNCAN.

[Corporate Seal.]

Attest: C. E. SATTERLEE, *Sec'y.*

Approved to operate as a supersedeas by
EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

[Endorsed:] No. 1048. The Texas & Pacific R'y Co. *v.* Michael Carlin. Bond. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Michael Carlin, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by

its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1048. The Texas & Pacific R'y Co. *v.* Michael Carlin. Writ of error. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

A copy of this writ is this day lodged in my office for the use of the defendant in error.

December 31, 1901.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

59 UNITED STATES OF AMERICA, ss:

To Michael Carlin or his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the

Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and one.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Carlin citation. Filed Jan'y 6, 1902. Charles H. Lednum, clerk.

We hereby accept service of this citation and acknowledge receipt of a true copy thereof January 2nd, 1902.

E. C. ORRICK,
J. C. TERRELL, JR.,
Attorney- of Record for Michael Carlin.

60 *Clerk's Certificate.*

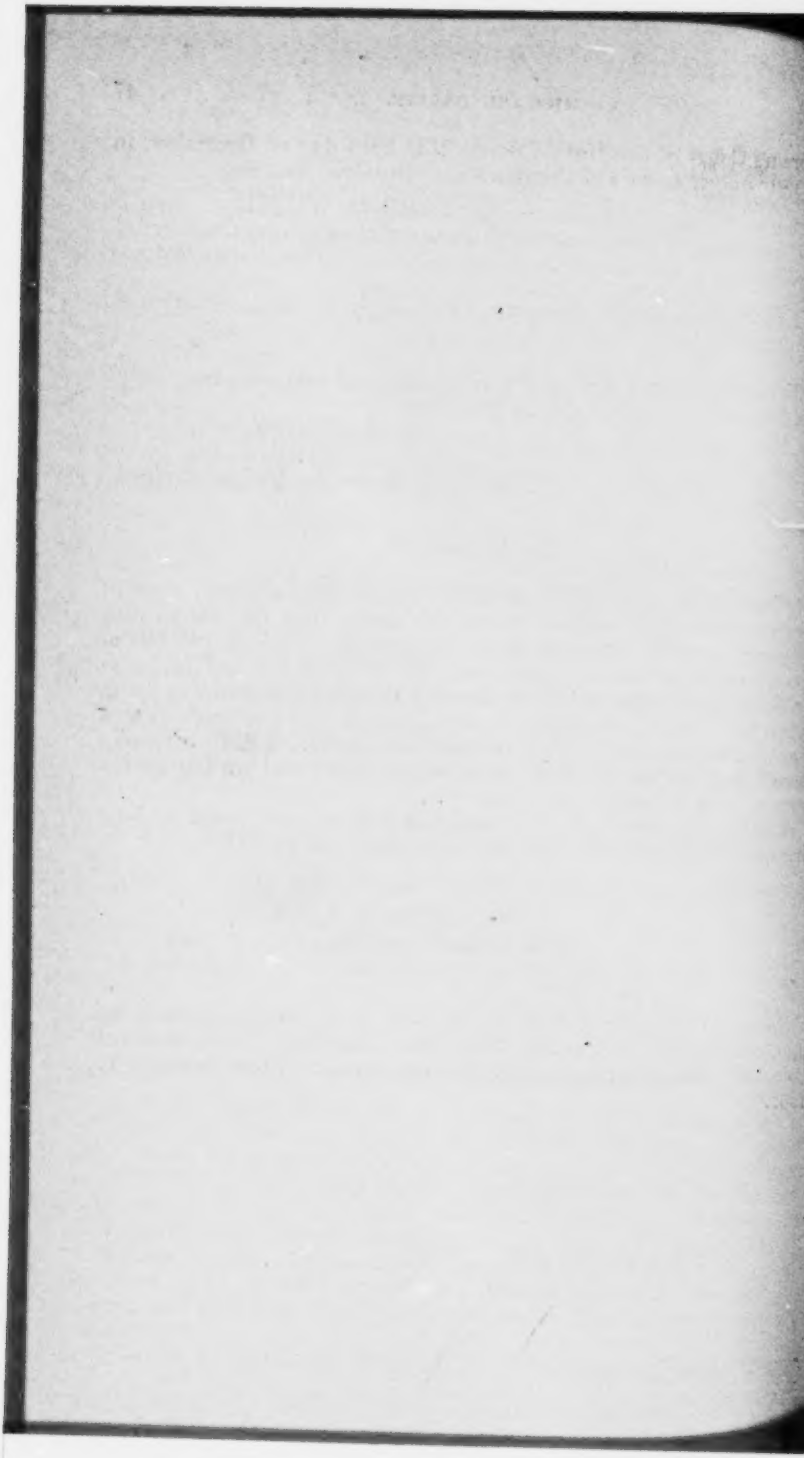
I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 1048, The Texas & Pacific Railway Company, plaintiff in error, *vs.* Michael Carlin, defendant in error, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains of record and on file in my office at New Orleans, Louisiana.

Witness my hand officially and the seal of said court at New Orleans, Louisiana, this 10th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18370. U. S. circuit court of appeal, 5th circuit. Term No. 222. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Michael Carlin. Filed January 15, 1902.



FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 322.

FILED
MAR 12 1906
JAMES H. McKENNEY,
Clerk.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MICHAEL CARLIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

S. C. Gunnison, Walker and Comell, Printers, N. Y.

25827

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. MICHAEL CARLIN.	No. 222.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was brought in the Circuit Court of the United States for the Northern District of Texas, December 10th, 1900, by Michael Carlin for damages for injuries sustained by him while a member of a "bridge gang" engaged in repairing a bridge on a line of the defendant Railway Company on the day of September, eighteen hundred and ninety-eight, sustained, as he alleges, on account of the negligence of the defendant.

The testimony shows that the "gang" under the superintendence of the foreman, one Welsh, in repairing the top of the bridge, were directed by the foreman to perform other duties, which called them away

from the bridge. One of them, probably Carver, left a maul or hammer, weighing about six or eight pounds upon the bridge. The plaintiff proceeded tothe main land, and was preparing to file a saw at a point some distance from the track, and about thirty or forty feet from the end of the bridge when the accident occurred. It appears that the foreman was the only man on the bridge when the freight train approached from the West. He testified that he looked for obstructions on the bridge, but saw none. After the train had passed it was found that the maul or hammer had struck plaintiff, the handle being broken off, and caused injuries which rendered necessary the amputation of his leg below the knee. The plaintiff alleged several acts of negligence, none of which were pressed at the trial, excepting the leaving of the maul or hammer upon the bridge, and the failure of the foreman to see and to remove it.

Defendant demurred ; pleaded specially that the alleged acts of defendant were not the proximate cause of the injuries ; pleaded the general issue ; pleaded specially that the negligence, if any, was that of a fellow servant of plaintiff ; that plaintiff was guilty of contributory negligence and that he had assumed the risks of his occupation (Tr., p. 6).

The jury rendered a verdict for the plaintiff in the sum of six thousand dollars ($6,000), for which sum judgment was duly entered.

Upon a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed ; from which judgment of affirmance defendant has taken out a writ of error to this Honorable Court.

Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment, affirming the judgment of the Circuit Court for the Northern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in the second paragraph of the Court's charge, wherein the Court, in defining negligence, instructed the jury as follows :

" Or in other words, negligence consists in omitting to do something which an ordinary prudent man would not omit, and in doing something which an ordinary prudent man would do under similar circumstances."

III.

The Circuit Court of Appeals erred in its judgment in affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in the third paragraph of its charge, wherein the Court instructed the jury as follows :

" The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company."

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the

Northern District of Texas, and in holding that said Court committed no error in the fifth paragraph of the Court's charge, wherein the Court instructed the jury as follows:

"If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and approximately contributed to the injury of the plaintiff, then and in that event it would be your duty to find for the defendant."

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury are instructed that, under the law and evidence, a plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running, or the fact that the bridge foreman did not have any flags out on that occasion and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul, was negligence; that is he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

"They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is, when it is more likely to follow this supposed cause than it is to fail to follow it.

"Bearing in mind the above definitions, the Court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances then in such event, the foreman in failing to discover the proximity of the hammer, would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for the defendant."

VIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

The Court instructs the jury that the burden of proof is upon the plaintiff to show negligence, and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for defendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"Although Welch, the bridge foreman, may have been in law the representative of the company, yet if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty—may be expected to be performed by any one of the men irrespective of his grade or rank—that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welch in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welch in this respect, if any there were."

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then in such event the jury should bring in a verdict for the defendant."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of the witness Ed. Carroll who was asked what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges, and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions

when a train approaches, to which question the plaintiff in error objected as calling for a conclusion and opinion of the witness and not a fact, to which question the witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags.

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of Ed. Carroll who was asked what was his duty with reference to seeing that a bridge was clear, to which the plaintiff in error objected as calling for a conclusion, and opinion of the witness and not a fact, to which question the witness answered that it would be the same thing; that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

XV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was against the evidence, for the reason that it appeared from the evidence that the servants of the plaintiff in error had exercised due care to discover any danger or any obstruction on the track.

XVI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court Committed no error in refusing to hold that the verdict of the jury was contrary to the evidence, because it appeared that if there was any evidence at all, that it was the negligence of a fellow servant of defendant in error.

XVII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was contrary to the law and the evidence, in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track, was not the proximate and direct cause of the accident.

XVIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the the negligence of Ed. Carver in leaving the hammer on the track, and plaintiff in error could not have reasonably anticipated that such would have been done.

BRIEF.

I.

The negligence of the Railway Company, if any, was that of a fellow-servant for which it is not liable.

We invite the Court's attention to the tenth assignment of error presented herein, which complained of the refusal of the Court to give a special charge as follows: "Although Welsh, a bridge foreman, may have been in law the representative of the company, yet if they find that the act of examining the track as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty which might be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say by the foreman and men alike, as occasion and circumstances might require, then in such event the act or duty of Welsh in this respect was one which existed between fellow servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were" (Tr., p. 28), and the third assignment of error (Tr., p. 40), which complained of the error in the third paragraph of the Court's charge, wherein the Court instructed the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

These assignments raise the question as to whether the railroad company was liable by reason of the alleged negligent acts of Welsh, bridge foreman, without reference to the capacity in which he was acting at the time the alleged negligence occurred. In consideration of

these assignments, we call the attention of the Court to these statutes of Texas:

"Art. 4560*f*. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employe of such person, receiver or corporation, and the fact that such servant or employes were fellow-servants with each other shall not impair or destroy such liability.

"Art. 4560*g*. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this State, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employes of such person, receiver or corporation, or with the authority to direct any other employe in the performance of any duty of such employe are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employes.

"Art. 4560*h*. All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow-servants."

Sayles' Civil Statutes of Texas, 1897, Arts. 4560*f*, 4560*g*, 4560*h*.

In the opinion rendered by the Circuit Court of Appeals in this case, it was said:

"It is clear that, on the proof, Welsh was in control and command of the plaintiff, and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of

work or service. Under the Texas statute, according to its letter, or as construed by the Texas Supreme Court, they were not fellow-servants (Long v. Chicago, R. I. & T. R. R. Co. (Supreme Court of Texas), 57 S. W. Rep., 802; Nix v. Texas and Pacific Railway Co., 18 S. W. Rep., 571)."

An examination of the case of Long vs. Chicago, R. I. & T. R. R. Co. shows that the question whether a foreman is at all times a vice-principal, or according to his employment may be a fellow-servant with those under him, was not involved and was not discussed. The question decided was whether a section-hand returning from work to the tool house to place his tools therein was a fellow-servant with other section-men engaged in carrying tools to the same house on a hand-car. The case of Nix vs. Texas and Pacific Railway Co., cited by the Court, was decided in December, 1891, before the articles above quoted were enacted in their present form which was in 1897. It was there held that "the power of such servant or agent to employ and discharge servants engaged with him in the same work will not alone constitute him the master, but where he has such power as foreman of the work being done over servants working under him, subject to his direction, his position is that of the master and the master would be liable for his negligence causing injury to such servants;" and the Court held that an instruction to the jury that the foreman would be a fellow-servant of a subordinate if he had authority to employ and discharge him, was misleading unless the Court proceeded to instruct them in the same connection, that, if the foreman had such power and also the power to direct and control the subordinate in his work, they would not be fellow-servants, but that the foreman would be the master.

It thus appears that the cases cited *supra* in the opinion of the Circuit Court of Appeals are inapplicable to the present case.

The first of these articles (4560*f*) renders railway companies liable for damages sustained by a servant "while engaged in the work of operating the cars, locomotives or trains" of such railway by reason of the negligence of any other servant, and provides that the fact that such servants were fellow-servants with each other shall not impair or destroy such liability. This article does not apply to the case at bar, because the plaintiff and his fellow-servants were not engaged in the work of operating cars, locomotives or trains.

It will be observed that the other two articles (4560*g* and 4560*h*) do not change the old rule as to the liability of a principal for damages to an employee caused by the negligence of a fellow-servant. They direct that the persons intrusted with the superintendence, control or command of other servants or employees shall be considered vice-principals, and not fellow-servants with their co-employees, and also define who are to be considered fellow-servants in the State of Texas.

If the negligence which caused the accident to the plaintiff was the leaving of the maul or hammer upon the bridge by one of the bridge gang, not the foreman, it was that of a fellow-servant, for which under these statutes and the law as it existed prior to their enactment the railway company was not liable. If, however, the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, the question arises whether the foreman neglected to perform a duty

peculiar to him as foreman, and which was specially imposed upon him as such foreman, within the meaning of Article 4560*g*, *supra* ; or whether it was a duty resting equally upon all the members of the bridge gang.

It is a well-known fact to this Court that the doctrine of fellow servant on the question as to when a certain person should be declared vice-principal or not is one upon which different constructions have been placed by various Courts, and it very frequently depended upon the forum as to how the issue should be determined. It seems to us that the only intention of the Legislature was to definitely determine just when such persons were vice-principals, and not in any way to assert that the company was at all times liable for the negligent acts of such vice-principal without regard to the character of the act he was performing. In the first of the articles above quoted (4650*f*) the company is specifically made liable for the negligence of one servant resulting in injury to another, while in the second (4560*g*), which defines the status of the vice-principal, this provision is omitted. This fact certainly justifies the conclusion that the Legislature intended to leave this question to be determined by the application of general law.

Granting that under the provisions of the Texas statute, Welsh was at the time the vice-principal of the company, yet we insist *(a)* that it is a well-established proposition of general law that, while a servant may be a vice-principal of a company, yet if the negligent act, which is complained of against him, arises in the performance of one of the duties of a mere servant, which might or could be performed by any co-employee, then the negligence was not that of a vice-principal but that

of a fellow servant. And we also insist *(b)* that Article 4560*g*, *supra*, does not cover the case at bar, for the alleged injury to the plaintiff did not result from any wrongful act of the alleged vice-principal arising out of his "superintendence, control, command or direction" of the plaintiff "in the performance of any duty of the plaintiff." The plaintiff's case is clearly outside of the statute, and the Court erred in not so holding as requested by the defendant, and in holding the contrary in its charge to the jury.

The plaintiff's witness, Carroll, testified under objection by the defendant (Tr., p. 12) that it was the duty of the foreman "to see that there was no obstruction and to see that it [the bridge] was clear at all times unless he had flags out." On cross-examination he was asked, "Then you would not rely, when working on a bridge, on the foreman to see if it was clear all the time," to which he answered, "No, sir; and if I was foreman, I would not rely on the men all the time." He was then asked, "You would rely on each other," to which he answered, "Yes, sir." Plaintiff's witness, Nichols, testified on direct examination (Tr., p. 12) in answer to the question, "What was the duty of the foreman with reference to seeing that the bridge was clear?" as follows: "It was every one's duty, each man was to clear up the bridge when the train was coming, and it was the foreman's duty to give orders and he was supposed to give orders and see that the track was cleared up." He also said that it was the foreman's duty to see that it was cleared up. On cross-examination (Tr., p. 15) he was asked if the foreman had to see that the work was being done right all the time, to which he answered, "No, not necessarily, but he could stand up above and give his orders

as well as not, but did not do that all the time." He also said that the men were supposed to clear everything safe, that the foreman was supposed to see that they did it. The plaintiff on direct examination (Tr., p. 17) said that it was the duty of the bridge foreman to see that the track on the bridge was clear and nothing on it, if the train was seen approaching. On cross-examination (Tr., p. 18) in answer to a question by the Court as to whether it is the duty of men on the bridge to see that the track is clear for a coming train, he said, that it is their duty.

Aside from this testimony, we claim that the duty of giving warning of, and of preventing, an approaching danger to any one exposed to it, is one which is imposed upon all persons however related to the person endangered, and even upon strangers. We further contend that the mere fact that the foreman was the only person who happened at the time to be upon the bridge cannot make the railway company liable for negligence of a duty, which was impressed upon all the members of the gang, and was not peculiarly one imposed upon him as foreman. Were it otherwise, the liability of this defendant would be made to depend upon the chance of a fellow workman or the foreman being on the bridge at the time. This proposition is sustained by well-adjudged cases. The question is preserved in the tenth assignment of error (*Ante*, p. 6).

In *Quinn vs. New Jersey Lighterage Co., 23 Fed. Rep., 363*, the captain of a barge was assisting a subordinate in doing work, which was not particularly his own as captain.

Judge WALLACE of the Second Circuit said:

"The question here is not whether the defendant is liable to a subordinate employe for the negligent act of

the captain in the discharge of his duty, but whether the defendant is liable for the negligence of the captain, not as a captain, but as a subordinate employe. The true inquiry in this case is whether the character of the act of the captain was one which was incumbent upon the defendant to see properly performed. This is the rule of Crispin vs. Babbit, 81 N. Y., 516, where it was held that the liability of a master for an injury to an employe occasioned by the negligence of another employe, does not depend on the grade or rank of the latter, but upon the character of the act in the performance of which the injury arose."

The Court cites the case of Hoke vs. St. Louis Ry. Co., 11 Mo. Appeals, where the following language was used:

"But just as the tortious act of a servant to make the employer liable must pertain to the particular duties of that employment, so the wrongful act of a vice-principal or *alter ego* must be an act done by him as vice-principal. The fact that he is vice-principal in one department of the business does not make all his acts the acts of a vice-principal."

Judge WALLACE proceeds:

"Applying the rule to the present case where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal, but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the defendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow laborers. It was the act of a co-servant, and among the risks incident to the employment which the plaintiff impliedly assumed when he engaged in the work. The captain exercised no more control over him than did the other laborers."

This decision was followed in Olsen vs. Oregon Coal & Nav. Co., 104 Fed. Rep., 475 ; The Kensington, 91 Fed. Rep., 681 ; The Miami, 93 Fed. Rep., 219.

The case of Stockmeyer vs. Reed, 55 Fed. Rep., 259, sustains the same principle.

In the more recent case of Illinois Central Ry. vs. Bolton, 9 A. & E. R. R., Cases (new series), 868, the Supreme Court of Tennessee very clearly draws the distinction, saying :

" It is apparent that one may be the general representative of a master, so as to charge the latter for the results of all negligence occurring within the scope of his employment, yet he may abandon his position of superior with the authority attached to it, and become a fellow-servant of those engaged in doing the work on hand and on a plane of perfect equality with them. In the one case the master would be responsible for his negligence ; in the other we think he would not be."

Quoting from Buswell in his work on personal injuries, 387, where this author discusses the doctrine of vice-principal :

" It is settled that a person who is in some things the mere servant may still be the agent of the master to perform other duties primarily personal to the master. On the other hand, if a workman charged in some direction with the duty of superintendence, does the negligent act complained of, not as superintendent, but in his capacity of fellow servant of the plaintiff, the master will not be liable for such negligent act."

By the evidence in this case, it appears that the duty rested upon all members of the bridge gang who might be upon the bridge, to look for and remove any obstructions when a train was approaching, and under the principles announced by the above authorities, it is clear that if Welsh, the foreman, was negligent in performing a duty which was equally the duty of those under him, his negligence in this respect would

be the negligence of a fellow servant and not that of vice-principal, for which the railway company would not be responsible.

Moreover we insist that the plaintiff's case is not within Article 4560*g*, *supra*, for the reasons above stated under Subdivision *(b)*, *supra*.

II.

There was no evidence of the negligence of the foreman in failing to discover the maul or hammer upon the bridge sufficient to warrant the jury to find a verdict for the plaintiff.

This question was saved by the fifteenth assignment of error and by exceptions to the charge of the Court and to its refusals to charge *(ante*, p. 8).

Under the charge of the Court and under the facts in this case, if any recovery can be had at all, it must be based solely upon the fact that the foreman failed to discover the sledge hammer or maul upon the bridge and to remove it therefrom. The only testimony upon this point is that of George Welsh, the foreman, who testified (Tr., p. 20) that he was about the middle of the first span when he saw the train coming; that he looked up and down the track to see if everything was clear; that he did not see anything, and stepped to one side when the train was three or four hundred yards from him; that he would have had plenty of time, if there had been anything on the bridge, to have gotten it off.

There is no testimony whatever to show where the hammer actually was, or that the foreman could have seen it. There is no evidence that the foreman was near-sighted or was otherwise incompetent to discover the hammer or maul if it was visible. The testimony is that he looked along the track for impediments and found none, therebyperforming his full duty. So far as the testimony goes, he did all that could be done under the circumstances to see if the track was clear. Welsh's testimony was not contradicted or attempted to be; and no evidence was offered in rebuttal, or attempted to be, and there was no attempt to contradict or impeach or discredit Welsh's evidence.

In order to reach a verdict for plaintiff the jury must have assumed that the hammer could have been seen and removed ; that the testimony of Welsh, which was not impeached or contradicted, that he looked for obstructions and failed to see any was untrue. No Court or jury had the right so to assume. That the train did strike the hammer is a reasonable deduction from the fact that it was thrown in the direction in which the train was going, but that it was in such a position as to convict the foreman of negligence in not discovering it was disproved by the uncontradicted testimony.

We respectfully submit that a jury is not justified in finding a verdict based upon assumptions, and that it could not have reached its verdict in this case without having assumed facts which were not only not proved, but disproved by the uncontradicted evidence in the case.

We call the Court's attention to the facts in this case, and submit that the bare statement of the facts brings the case within the rule, and that the peremp-

tory instruction should have been given. We take the testimony of the plaintiff himself. In September, 1898, he was working as a bridge carpenter in the service of The Texas and Pacific Railway Company, and when so working near Aledo tank bridge, he was hurt. How? A spike maul, or hammer, had been left on the bridge or track by a fellow employee, who, under the charge of the Court, was a fellow servant of the plaintiff, and a passing train is supposed to have struck the hammer, causing it to strike the plaintiff, breaking his leg. Under the charge of the Court, and under the facts in this case, if any recovery can be had at all, it must be based solely and alone upon the fact that the sledge hammer or spike maul was not discovered by the foreman in charge of the bridge gang, and if discovered by him was not removed in time to prevent the accident. Carlin testifies himself that while doing the work of the kind he was employed to do when he was injured (and he is corroborated by the other witnesses), it was not necessary to put out flags to warn trains (Tr., p. 17). Carlin further testified that the men at work are expected to look out for approaching trains (Tr., p. 17). Carlin further testified that when a man is using a tool, such as a hammer to drive spikes, he is supposed to put it out of the way when he has finished with it, and an old experienced bridgeman will do it, but it is the business of the foreman to watch a green man (Tr., p. 17). There is no proof in the record that the spike maul was handled by a green man. Carlin further testified that it was the duty of men on the bridge to see that the track is clear for a coming train (Tr., p. 18). George Welsh, foreman of the bridge gang, and to whose alleged negligence is attributed the cause of the

injury, testified that on the morning plaintiff was injured that he was about the middle of the first span of the bridge when he saw the train coming; that he looked up and down the track to see that everything was clear; that he did not see anything, and stepped to one side when the train was three or four hundred yards from him; that he would have had plenty of time if there had been anything on the bridge to have gotten it off (Tr., p. 20). That when a man is using tools and gets through with them he is supposed to put them out of the way where a train will not strike them; that the foreman is liable to be anywhere about the bridge at any time, and cannot be depended on to be at any place (Tr., p. 21).

There is not a particle of proof in the record to show where the maul was lying when it was struck, whether on the bridge or on the track, or on the side of the bridge or on the side of the track. There is not a particle of proof to show that the foreman, Welsh, could have possibly seen the hammer if it had been on the bridge, or on the track, or on the side of the bridge, or on the side of the track, there being no evidence at all as to where the hammer was located, and as to whether or not it was in a place where he could have seen it, or did see it. He states that he did not see it; that he was on the middle of the first span of the bridge when he saw the train coming, and that he looked up and down the track and did not see anything on the track; that everything was clear. He shows by his uncontradicted testimony that he did all that could be done, under the circumstances, to see that the track was clear. He had a right to suppose, and the Court recognizes this right, that parties using tools, when aware of an approaching train, would

remove them. Tools of various sizes would be used in bridge work; small hammers and big hammers, small nails and big nails, and they would be used at various parts of the work. Working on a bridge of two hundred feet, some of the tools might be in the middle of the bridge and some at each end when a train was approaching. The foreman, as the proof showed, might be working underneath the bridge; he might be working at the extreme end of the bridge, and in a position where he could not possibly see that all the tools were removed.

In other words, this record discloses the fact that the rule in matters of this kind was that each man should look after the tools with which he was working, and keep them free and clear of the track when trains were approaching; that this was his duty; that the foreman, when in a position to do so, would, to a certain extent, supervise this duty, as far as he could possibly do so, but that it was not his duty alone, and that the men working under him were aware of this fact, and expected to see that the tools were removed. This record discloses the fact that Carlin, the plaintiff herein, was fully advised of this rule; that he was expected to conform to it himself, and that he assumed the risk of his fellow-servants conforming to it. There is literally no evidence in this record to show any negligence upon the part of Welsh, the foreman, to find this hammer, or to remove it after he found it; there is no evidence showing where the hammer was, whether it was hidden from view or whether in view. There is literally no evidence upon which a jury can say that the hammer was at such a place, and that Welsh was located at such a point that he must have seen it, and neglected to remove it after seeing it. The fact that

the hammer was struck by the engine or train, and was thrown against Carlin, is not a fact, in itself, that speaks, so that the doctrine of "*res ipsa loquitur*" does not apply. The jury could only suppose a fact, and then base a supposition upon this supposed fact. They must suppose, first, that the hammer was left at a point or place on the track or bridge where the foreman could see it, and that he negligently failed to see it; that he failed to exercise ordinary care to ascertain it; that if he did ascertain it was on the track, that he failed to exercise ordinary care to remove it. All of these are pure suppositions, unsupported by any evidence. The only evidence in this case upon which the jury based their verdict is the fact that Carlin was struck by a hammer which had been struck by a passing train, and this fact cannot support the verdict, in view of the fact that, if the hammer was left where the train could strike it, it had been left there by a fellow-employee and a fellow-servant of Carlin, who assumed the risk of his negligence when he accepted employment.

The rule of this Court was announced in *Pleasants vs. Fant, 22 Wall., 116, 120.*

Justice MILLER said:

"But, as was said by this court in the case of Improvement Company v. Munson, 14 Wallace, 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

We submit to the Court that there is literally no evidence upon which a verdict can be based, and that

this case comes within the purview of the rule thus pronounced by this Court.

We submit to the Court that the facts detailing the character of work that was being performed at the time Carlin was hurt, and how this work was usually performed, clearly established the fact that the men using the tools were expected to remove them, and to see that they were removed; that Carlin was advised of this fact. The record unquestionably establishes the fact that Welsh, the foreman, had not been using the spike maul, and was not negligent in removing the same after he discovered the approach of a train; that if any negligence existed at all, it was the negligent act of a fellow servant in failing to remove the maul after a train was discovered approaching; that this failure was the proximate cause of the accident to Carlin, and not the failure of Welsh, the foreman to discover it, for he is shown to have exercised all the care that could have been exercised under the circumstances, and there is no proof to show that the maul was in a place where he could have seen it, or where he did see it.

The proximate cause would have been the leaving of the hammer on the track by the fellow-servant of the plaintiff. This being so, then unquestionably the plaintiff must establish, by a preponderance of the evidence, the place where the hammer was, and the failure of the foreman to remove it after he discovered it, or that it was in a place where, if he had discovered it, he could have removed it before it was struck by the train; otherwise, the act of the foreman could not be the proximate cause, but the proximate cause would be the failure of the fellow-servant of Carlin to remove the hammer. In any light that you view the evidence, no right of action would exist in favor of the plaintiff,

for the reason that he has failed to make out his case showing negligence upon the part of the company, or upon the part of the company through its vice-principal.

In our judgment this case is, in principle, on all fours with *Patton vs. The Texas and Pacific Ry. Co., 179 U. S., page 658.*

Mr. Justice BREWER said (p. 663):

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely *(Stokes v. Saltonstall, 13 Pet., 181; Railroad Company v. Pollard, 22 Wall., 341; Gleason v. Virginia Midland Railroad Co., 140 U. S., 435, 443);* **a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence (Texas & Pacific Railway v. Barrett, 166 U. S., 617). Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer it is only one of the many cases in**

which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

These principles are precisely and exactly applicable to the case at bar. We requested their application by the trial Court and our requests were refused and contrary instructions were given. The judgment below should, therefore, we submit, be reversed and a new trial ordered.

Respectfully submitted,

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WINSLOW S. PIERCE,
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Counsel for Plaintiff in Error.

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In the Supreme Court

OF THE

United States of America.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CARLIN, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

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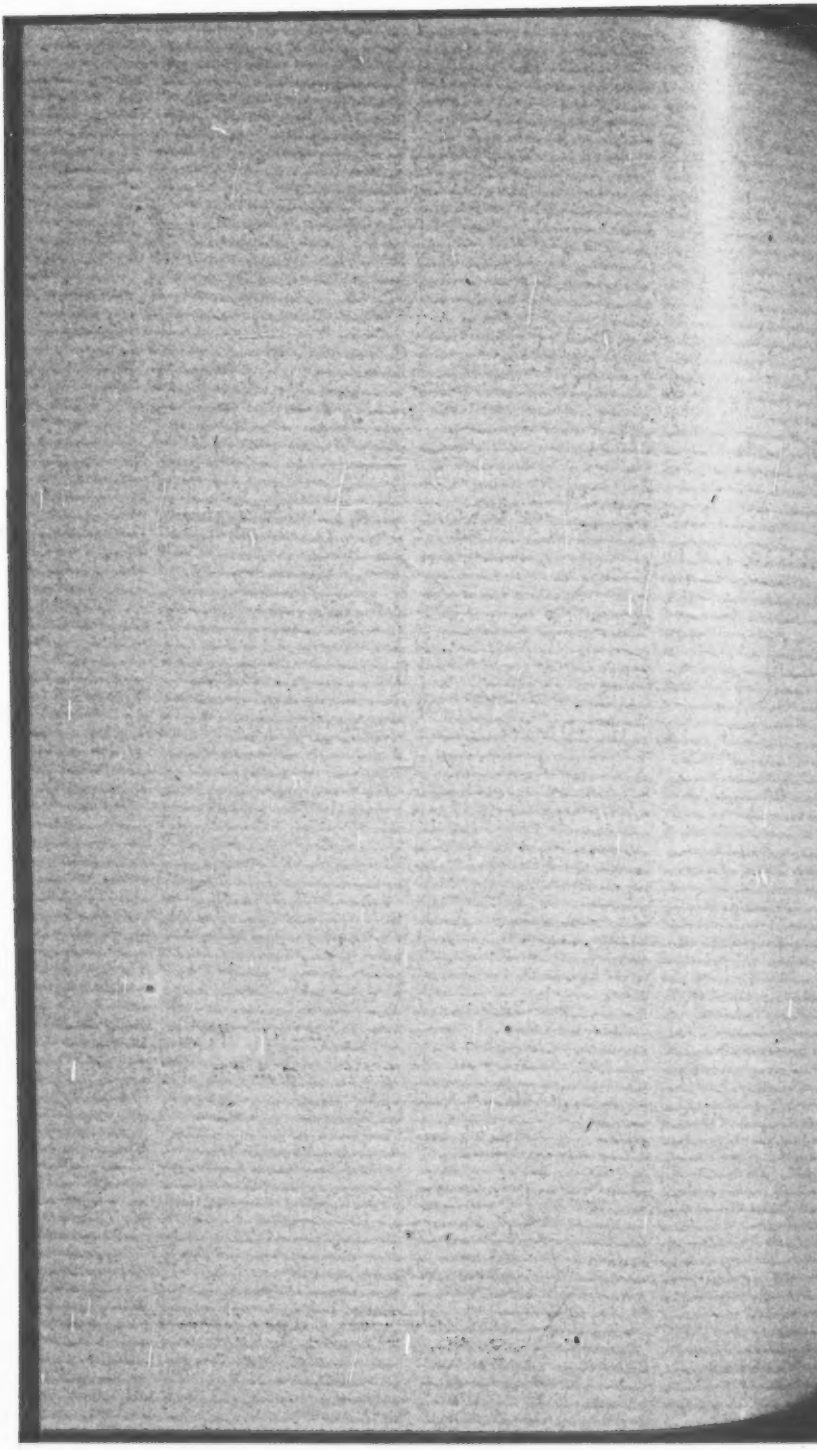

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BRIEF OF DEFENDANT IN ERROR.

The opinion of the Honorable Circuit Court of Appeals for the Fifth District states the nature and result of the case and the portant facts so clearly that we do not see that we can aid it, and we only wish to call the Court's attention to the fact that, instead of the maul in controversy being located by the evidence near the foreman, Walsh, *ten or fifteen* minutes before the accident, as stated

in the Court's opinion, it was so located within *one or two minutes* of the accident, as will appear from the statement of the evidence hereinafter made.

We do not preface our brief with a statement of the nature and result of the cause of action, for the reason that we presume the plaintiff in error will make one, and the opinion of the Court below, as aforesaid, makes a full statement, and one of the specifications of error being based upon the refusal of a peremptory charge, our reply makes it necessary that we set forth the evidence substantially in full.

In view of the form of the assignments, we feel that it is necessary for us to call this Court's attention thereto by two independent propositions, which we make without argument, merely citing the authorities thereunder.

FIRST INDEPENDENT PROPOSITION.

The assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 can not be considered by the Court, for that they are not in compliance with the rules of this Court, in that the evidence, if any there be, showing the relevancy of the propositions of law propounded thereby is neither quoted in full nor its substance referred to in the assignments of error.

AUTHORITIES.

Rules of the United States Circuit Court of Appeals, Rules 11 and 24, 1 Fed Rep. XIV, xx.

Union Casualty and Surety Co. vs. Schwerin, 26 C. C. A., page 45; 81 Fed., p. 529.

Newman vs. Virginia, T. & C. Steel & Iron Co., 25 C. C. A., 382; 80 Fed. Rep., 228.

Grape Creek Coal Co. vs. Farmers' Loan & Trust Co., 12 C. C. A., 353; 63 Fed., 891; 80 Fed. Rep., 228.

Southwest Virginia Imp. Co. vs. Frari, 7 C. C A., 149; 58 Fed. Rep., 171.

Van Gunden vs. Virginia Coal and Iron Co. 3 C. C. A., 294; 52 Fed Rep., 838.

SECOND INDEPENDENT PROPOSITION.

The assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9. 10, 11, 12, 13, 14, 15 and 16 cannot be considered by the Court, for that the same are too broad and general under the rules of this Court.

AUTHORITIES.

Grand Trunk Ry. Co. vs. Ives, 144 U. S., 417.

Van Stone vs. Stillwell & Brice Mfg. Co., 142 U. S., 128.

COUNTER-PROPOSITION

UNDER FIFTH, NINTH, FIFTEENTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH SPECIFICATIONS OF ERROR.

The verdict of the jury was amply supported by sufficient testimony.

ARGUMENT AND STATEMENT.

We think it better to combine both argument and statement on a proposition of the character of this one, and therefore pursue that course.

We will lay the evidence before the Court, as we see it, and the Court will judge.

In the first place, M. Carlin was hurt; in the second place, he was hurt by a hammer hurled against him by a train approaching him; in the third place, the hammer was one which had been in use

by the bridge gang, not only before they went to work on the Aledo bridge, but on the morning of the accident; in the fourth place, the hammer was quite a large one, eight or ten inches long, weighing from ten to fourteen pounds, with a long handle in it, three feet long; in the fifth place, this hammer was found near Carlin immediately after his injury, with the handle freshly broken out; in the sixth place, the foreman was on top of the bridge when the accident occurred.

These facts, we take it, are undisputed, and are set out as forming the basis for the establishment of the facts, wherein it is contended that the evidence is insufficient.

It should be remembered that the recovery of plaintiff was confined by the charge of the Court, so that if the jury believed that any other person than the foreman was on the bridge at the time of the happening of the accident he must fail of a recovery.

Therefore, the facts to be established in addition to those heretofore set out are:

First—Was the foreman alone on the bridge at the time of the happening of the accident, and if so at what point on the bridge was he?

Second—Was the hammer on the bridge at that time? I so, at what point was it?

Third—If the hammer was on the bridge at that time, was it so placed that the foreman saw, or by the exercise of ordinary care might have seen it?

If it is demonstrated that the foreman was alone on the bridge, within a few feet of the hammer, and that the surface of the bridge had no obstruction on it, we are bound to say that to every reasonable mind it will be perfectly clear that the evidence amply sustains the verdict.

True, no one testifies that the hammer, at the very time of the accident, was on the bridge near the foreman. The reason for

this is plain. If the foreman should say he saw it, the inquiry would naturally arise, why did he not pick it up. If he said Carver left it there when he went off the bridge he would naturally feel that he was partly to blame, and hesitate to too sharply test his memory.

The foreman says that he was on the bridge at the time of the accident. He says [Rec., p. 24] that he was about the middle of the first span when he saw the train coming; * * * when he saw the train coming he looked up and down the track to see if everything was clear; did not see anything. and stepped to one side when the train was three or four hundred yards from him; *that he would have had plenty of time,* if there had been anything on the bridge. to get it off; * * * *that the track was not obstructed.*

I. E. Line, assistant foreman, test fied [Rec., p. 19]: "He was about one hundred yards east of the bridge when the train came, going after some timbers, with others. * * * There had been a spike maul used there that morning; * * * that he had used it himself just before he went out for the timber. * * * He was using it on the south side of the bridge for putting up the staging or scaffold. When he finished, he handed it to some one on the top of the bridge, who handed it to Mr. Carver." Witness states that he does not recollect any other spike maul or hammer there that morning than the one he had used, which was the regular spike maul described by former witnesses. Here witness testified to finding of maul after train passed as did other witnesses. * * * [Rec., p. 19]. There were several men working up at the east end of the bridge, Carver among them.

Ed. Carroll, plaintiff's witness, testified [Rec., p. 11]: "Just before the accident occurred he was east of the bridge, going after a piece of scantlin. * * * Soon after train passed he looked around and saw Carlin lying on the ground near the bank about sixty feet from witness. They went and picked up Carlin, and some one picked up a spike maul lying on the other side of Carlin,

with the handle broken off. That he had seen the spike maul before; that it had been used ever since he had been at work with the bridge gang, and it had been used on the track that morning; that he had seen some of the men driving spikes and nails with it *ten or fifteen minutes* before Carlin was hurt. * * * There were no flags out that morning." This witness says he saw some men on the track when the train passed. [Rec., p. 11.] Evidently he was not paying much attention, as he was going from the bridge for a scantlin. Witness further testified he saw Ed. Carver using it (the maul testified about) ten or fifteen minutes before the train came. They had been at work on the bridge an hour or an hour and a half.

Chas. Nichols, plaintiff's witness, testified as follows [Rec., p. 14]: He was standing about one hundred and fifty feet east of bridge when he first saw it (the train); that he had gone to get a piece of timber; that before the accident he had seen Ed. Carver out on the bridge using the spike maul; that he had left the bridge and gone out on the track *only a minute or two before the accident* and Ed. Carver and the foreman were the only men on the bridge. Walsh was on the bridge somewhere near the east end. He further testified [Rec., p. 16]: "The surface of the bridge was plain, that is, the ties were about eight inches apart, and there was nothing on top of them except the rails and the guard rails; the rails were of ordinary size; the guard rails were about ten inches from the rails and parallel with them. The guard rails were eight inches above the ties; they were let down over the ties about two inches; they were wood; the length of the span was about sixty feet; a bent is fifteen feet; the east approach consists of two bents."

Ed. Carver, witness for plaintiff, testified as follows [Rec., p. 18] "That he had been assisting to put some braces on the side of the bridge. * * * When the train passed he was beside the bridge, near the east end, and had been there but a few minutes;

that at the time the foreman was standing on the side of the bridge. Just prior to that time he had been working on the north side of the track, near the east end of the bridge, about ten feet from the end of the approach; that he and the foreman were the only persons on the bridge: that after he nailed the last piece of timber * * * he got down on the ground and was about ten feet from Carlin, and had been there not over three or four minu es when the train passed. * * * He states that he saw the maul lying near Mr. Carlin after the accident, and that he had seen it before, that morning, lying on the bridge; * * * that he got to plaintiff first after he was hurt; that he does not remember of seeing any one on the bridge by the foreman at the time. * * * [Rec., p. 18.] That it was a spike maul that was being used, and it must have been the one that was found near Carlin."

Mr. Carlin, plaintiff, testified [Record, p. 16]: "He was about twenty-six feet from the bridge at the time (of the accident), walking away from the track."

The evidence tending to establish the case of plaintiff for the purpose of testing these assignments must be taken as true.

From this evidence as find that Line, Nichols, Carroll and Carver were working near the east end of the bridge, a short time before the accident. They had all seen the maul there, and identified it as the one that hit Carlin. Welsh, the foreman, was also there. The span was sixty feet, the approach thirty. When the witnesses speak of the bridge, they being bridge men, it is apparent that they mean the span. The expression, near the east end, would resonably be fifteen feet west of the east end of the span; Carver makes it ten. These five men and the maul were there; then first Line and Nichols go off for a piece of timber, leaving Carver with the maul, and Carroll and Walsh with him on the bridge; (they had not been gone over a minute or two, according to Nichols, when the train came along) Carroll then leaves for a piece of scantlin,

Carver nails on his last piece of timber, walks down, and is by Carlin when he is hurt, leaving Walsh alone on the bridge. The hammer was last seen only a minute or two before, right at Walsh. It was certainly on the bridge. Carver must have been within five feet of Walsh, a legitimate conclusion, from the evidence, when he finished and laid down the maul. The evidence shows that the maul was a large object with a three-foot handle, on a plain surface with no obstruction.

Could it be inferred, or legitimately deduced from this, that Walsh saw, or ought to have seen it. The conclusion is irresistible. The circumstantial evidence is strong enough to convict a man of murder.

It is so wonderful that Walsh did not see it, that the theory naturally suggests itself to our minds that the real truth is that the train was so close on Walsh before he heard it that he became frightened and at once got off on the side of the bridge. This deduction is abundantly warranted from the testimony of Nichols [Rec., p. 14], Carlin [Rec., p. 16], Carroll [Rec., p 11], Carver [Rec., p. 19]; all in substance, to the effect that the train was very near the west end of the bridge when discovered, and that it was coming from thirty to forty miles an hour.

After the discussion of this proposition, will it not occur to the Court that the assignments of error do not point out the error complained of, to-wit: that there was no evidence that the hammer was on the bridge in a position in which it was, or could have been seen by the foreman. The statement of this suggestion only reinforces our independent propositions.

SECOND COUNTER-PROPOSITION

UNDER FIFTH, NINTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH SPECIFICATIONS OF ERROR.

When a given state of facts is such that reason-

able men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. The question of negligence is one of law only, when the facts and circumstances are such that all reasonable men must draw the same conclusion from them.

AUTHORITIES.

Gardner vs. Mich. Cent. R. R. Co., 150 U. S., 340.
Grand Trunk R. R. Co. vs. Ives, 144 U. S., 408.

In answer to the tenth specification of error we make the following counter-proposition, to-wit:

FIRST COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The statutes of the State of Texas, defining vice-principal and fellow servant, and copied in this brief under second assignment of error, makes the question of fellow-servant depend entirely, amongst other things, upon the grade of employment, and not the act done or omitted to be done. This had been the rule governing the relation of master and servant, ultimately adopted by the Supreme Court of this State prior to the passage of the act.

AUTHORITIES.

Nix vs. Texas & P. Ry, Co., 82 Tex., 473.
Sweeny vs. Ry. Co., 84 Tex., 433.

SECOND COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The master owes to the servant a reasonably safe place in which to perform his work, and to use ordinary care to keep same in a reasonably safe condition, and if, instead of personally performing these obligations, he engages another to do so, he is liable for the neglect of that other.

AUTHORITIES.

N. P. Ry. Co. vs. Peterson, 162 U. S., 346, 353
Hess vs. Rosenthal, 160 Ill., 621.
Harrison vs. Detroit Ry. Co., 79 Mich., 409.

ARGUMENT.

The question of who are fellow-servants went through various changes in the decisions of this State, some decisions adopting the rule of determining the relation from the character of the act done, or omitted to be done, the other from the grade of those employed. The legislature, to settle this question, adopted the latter rule. Under the evidence, Walsh was a vice-principal, and he was, and is, doubly made so under the statute; he had absolute supervision and control of the men. He directed Carlin to file saws; he was his superior. He was engaged in no work, but was on the bridge supervising and directing the men in their work. The law made it his duty, as the representative of his master, to furnish a safe place in which the work could be done, and to take such precautions as were necessary to keep it reasonably safe. This duty was one that devolved upon the master, and by making it the duty of fellow servants, while on the bridge, if a train approached, cannot change his liability if he neglected this duty, and the place, by reason of

his neglect, became unsafe. It was Walsh's duty to keep all obstructions from the bridge, and to keep same clear of obstructions. There were no servants on the bridge when the train came. The foreman alone was there; was it not his duty to have and to keep the bridge at all times clear of all obstructions likely to cause injury, and was not this duty heightened by reason of the fact that he had no slow orders or flags out, and at any time he might expect a train, at what rate of speed he did not know? Can the master, by being upon this obstructed bridge alone, after sending his men to various duties away from the bridge, so that he could not, in an emergency, summon them to remove the obstructions, avoid liability by saying that it was equally the duty of a fellow servant to remove obstructions from the track? No, no more could he delegate this positive duty he owed the men under his control. Had a fellow-servant been on the bridge with the foreman, then possibly the duty devolved upon the foreman to make him remove any obstructions, but such was not the case, and hence there can be no error in refusing the charge complained of. It was his duty to see it was clear; that was what he was there for. Can he by neglect of this duty escape liability, because, being alone, he failed to perform it, while acting in the capacity of vice-principal, as defined by the statutes?

THIRD COUNTER-PROPOSITION

UNDER THE TENTH SPECIFICATION OF ERROR.

The Supreme Court of the State of Texas, having construed this statute, the Supreme Court of the United States will follow this construction.

AUTHORITIES.

U. S. Rev. Stat., Sec. 721.

Baugh vs. B. & O. Ry. Co., 149 U. S., p. 368.

Long vs. Chicago, R. & T. Ry. Co., 94 Tex., 53.

French vs. Ill. Cent. Ry. Co., 100 Fed. Rep., 247.
Pearce vs. Van Duzen, 78 Fed Rep., 693.

FOURTH COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The negligence in this case was within the non-assignable duties of the railway company, in that it was the duty of the company to provide a reasonably safe place in which its men could work, and to use ordinary care to keep it safe, or to make it safe if its unsafe condition was apparent to the company, or its vice-principal, or if its unsafe condition ought to have been, or could, by the exercise of reasonable prudence or diligence, have been known to the company or its vice-principal in charge of the work, and this duty is one which cannot be, by the principal, so neglected that it can escape liability for its non-performance, nor can he, in the exercise of his authority, so distribute his men as that in an emergency he should, in the performance of his duties, be compelled to perform a menial act, and thereby, by his failure to do so, exempt his employer from liability.

FIFTH COUNTER-PROPOSITION

UNDER TENTH SPECIFICATION OF ERROR.

The charge of the Court, confining the recovery of plaintiff to the fact that the foreman was alone on the bridge, amongst other facts, the requested charge

could have no possible application to the state of facts upon which plaintiff recovered. Therefore, the Court did not err in refusing the requested charge.

STATEMENT.

Charge of the Court: "* * * and you further believe, from the evidence, that at the time the train approached the foreman of the bridge gang was the only person upon upon the bridge. [Rec., p. 22.]

The inapplicability of the requested charge upon the above statement was apparent.

In answer to the seventh specification of error we make the following counter-propositions, to-wit:

FIRST COUNTER-PROPOSITION

UNDER SEVENTH SPECIFICATION OF ERROR.

The Court properly and fully instructed the jury concerning the matters complained of in special charge No. 3, the refusal of which is assigned as error.

STATEMENT.

Charge of the Court [Rec., p. 22]: "* * * and if you further find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you will find for plaintiff."

Charge of the Court, Sec. [Rec., p. 23]:

Sixth—"If you should find that the defendant, through the foreman of the bridge gang, was guilty of negligence, you must also find that the negligence of the foreman was the proximate cause of the accident and injury to plaintiff. And you are charged that an

act of negligence is the proximate cause of an injury, if the act of negligence contributed to cause the injury, and was such an act that an ordinary careful and prudent man could and would have anticipated the causing of the injury under the facts and circumstances existing at the time, and which were known, or could have been known, to him by the exercise of ordinary care, had he been in the foreman's place and stead; and it is not necessary, in order to constitute an act of negligence, the proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the accident or injury should happen or occur in the particular manner in which it did occur."

SECOND COUNTER-PROPOSITION

UNDER SEVENTH SPECIFICATION OF ERROR.

The requested charge is not, under the facts in this case, a correct proposition of law, in that it required the result that followed from the foreman's failure to discover the maul to be such a result as ought to have been foreseen in light of the attending circumstances. For that it necessitated the foreseeing that the exact result would follow, and ought to have been foreseen. Whereas, the true rule is, that if an ordinarily prudent person ought to have foreseen that injury might likely result to any person by reason of the negligence of the foreman in discovering the maul on the track, under the circumstances, the anticipation of any injury would be sufficient to con titute the leaving of the maul there, while a train was approaching, the probable consequence of the injury done and the proximate cause thereof.

AUTHORITIES

Texas & Pocific Ry. Co. vs. Short, 58 S. W. R., 57, 58.
Doyle vs. Chicago, St. Paul & Kansas Ry Co., 39 Am. & Eng. Ry. Cases, 314.
Baltimore & Ohio Ry. Co. vs. Anderson, 85 Fed. Rep., 413.
Herrich vs. Jagby, 101 Fed. Rep., 187.
Lopfi vs. Postal Telegraph Cable Co., 60 Fed. Rep., 987.
Chicago & N. W. Ry. Co. vs. Prescott, 59 Fed. Rep., 237.
Jackson vs. G. H. & S. A. Ry. Co., 90 Tex., 372.
G. C. & S. F. Ry. Co. vs. Wood, 63 S. W. R., 164.
G. C. & S. F. Ry. Co. vs. Marchand, 57 S. W. R., 860.

In answer to the ninth specification of error we make the following counter-proposition, to-wit:

COUNTER-PROPOSITION

UNDER NINTH SPECIFICATION OF ERROR.

The Court correctly and fully charged the law in reference to the point made in the special charge No. 5, the refusal of which is assigned as error.

STATEMENT.

Charge of Court, Sec. 6. [Rec., p. 23] already set out under counter-proposition to seventh specification of error.

Charge of Court, Sec. [Rec p 22]:

Fourth—"If you believe from the evidence that the spike maul testified about was left on the bridge by a fellow servant of plaintiff, and you further believe from the evidence that at the time the train approached, the foreman of said bridge gang was the only person upon said bridge, and that he could, by the exercise of ordinary care, as I have defined same herein, have seen said spike maul and removed same from the track and from proximity thereto, if you believe it

was on the track or in proximity thereto, and if you further believe that it was the duty of such foreman to use such care to see that the track was clear and no obstruction on the track, or so near it as to be struck by a passing train, and if you further believe said foreman did not use such care, and that said spike maul or hammer was struck by said train and hurled against said plaintiff and caused him said injuries, and if you further believe that it was negligence of the foreman in failing to see and remove said spike maul, if you find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you should find for the plaintiff."

Section 5, charge of Court [Rec., p. 23]: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it will be your duty to find for the defendant."

In answer to the third specification of error, we make the following counter-proposition, to-wit:

COUNTER-PROPOSITION

UNDER THIRD SPECIFICATION OF ERROR.

The charge of the Court complained of was justified by both the law and the evidence.

STATEMENT.

George Walsh, foreman, testified [Rec., p. 21]: "That as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him, as well as all the other bridge men who were working there on that morning.

AUTHORITIES.

Articles 456of, 456og and 456oh, Sayles Civil Statutes of Texas, 1897.

These statutes are set out in full in the marginal note to the opinion of the Court below, and are as follows:

STATEMENT.

Sayles' Revised Statutes of Texas, 1897.

Article 456of. Liable for injuries co-servants end employes. Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employe of such person, receiver or corporation, and the fact that such servants or employes were fellow-servants with each other shall not impair or destroy such liability. [Acts 1897, S. S., p. 14, Sec. 1.]

Art. 456og. Who are vice-principals.

All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, who are instructed by such person, receiver or corporation, with the authority of superintendence, control or command of other servants or employes of such person, receiver, or corporation, or with the authority to direct any other employe in the performance of any duty of such employe, are vice-principals of such person, receiver, or corporation, and are not fellow-servants with their co-employes. [Ib., Sec. 2.]

Art. 456oh. Who are fellow-servants.

All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or

street railway, and who, while so employed, are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place, and at the same piece of work, and to a common purpose are fellow-servaets with each other. Employes who do not come within the provisions of this article shall not be considered fellow-servants. [Ib., Sec. 3.]

To this point we have followed the opinion of the Court in the order in which the points made by the plaintiff in error were considered by the Court below, and have done so hoping that it would be for the convenience of this Court. Having considered the foregoing specifications of error, which include all the assignments of error noticed by the Court below, it still remains for us to consider those assignments of error briefed in the Court below and not noticed by it, to-wit: the first and fifth assignments of error in the Court below, being the second and sixth specifications of error in this Court, and while we regard them as so immaterial as not to require notice, yet nevertheless we feel that the counter-propositions made by us may not be out of place, and we make, under the second specification of error, the following counter-proposition:

COUNTER-PROPOSITION

UNDER SECOND SPECIFICATION OF ERROR.

The assignment of error in the Court below does not correctly quote the charge of the Court, which is as follows: "Ordinary care is defined as such care as a person of ordinary prudence might be expected to exercise under similar circumstances" More than this the law does not require, but less than this is negligence, or in other word, negligence

consists in omitting to do something which an ordinarily prudent man would not omit, or in doing something which an ordinarily prudent person would not do under similar circumstances. In the preceding sentence the Court instructed the jury that only ordinary care was required of the defendant, and throughout the charge used the expression in reference to the degree of care to be exercised by the defendant, "that of a man of ordinary care and prudence." The charge as a whole, as given, is correct, and no prejudice could have resulted to the defendant therefrom nor could the jury have been misled thereby.

And under the sixth specification of error we make the following counter-proposition:

COUNTER-PROPOSITION

UNDER SIXTH SPECIFICATION OF ERROR.

The Court did not err in that it refused the second special charge requested by the appellant, in that it requested the Court to eliminate from the consideration of the jury the rate of speed of the train, and the fact that the bridge foreman did not have out flags, for that they were attendant circumstances to be considered by the jury in determining the question of diligence to be observed by the foreman to guard against accident.

STATEMENT AND ARGUMENT.

It is a rule that his care at all times was such care as a person of ordinary prudence would exercise under similar circumstances,

but the degree of diligence to be exercised would be increased or diminished according to the surrounding circumstances known, or that it was his duty to anticipate.

AUTHORITIES.

Ry. Co. vs. Smith, 87 Tex., 354.
Ry. Co. vs. Brenig, 25 Md., 388.

In presenting the case for the defendant in error, we have not thought it proper, in view of the very lucid opinion of the Court below, to make any extended argument on any proposition, feeling that it would burden the Court, and could not assist it in any way.

We do not feel, however, that we can do justice to our client unless we suggest to this Court that this writ of error was taken for delay merely, and not that justice may be done. It will be perfectly apparent to this Court that there is not a specification of error made which has in it, viewed in the light of the opinion of the Court below, and of the general law upon the subject, the slightest merit. The history of litigation in appellate courts is a matter well known to this Court, that if, by presenting unto this Court specifications of error so obviously untenable as those herein presented, the plaintiff in error can obtain long delays in being compelled to pay the judgment against it, it must at once appear to this Court that great injustice is likely to be done to litigants who are unable to bear the cost of expensive litigation and to await the long delays which necessarily flow from a writ of error to this Court.

As will appear from the opinion of the Court below, as is usual in such cases, appeal to the Court is sought to be made for leniency on the ground that the juries are prejudiced against corporations, a contention which the Court below dealt with in a most just and satisfactory way. But whatever may be the case in this regard, this is a case in which it certainly cannot be said that any prejudice of

any sort had any weight, for peculiar as it may seem there is not, in this record, a disputed fact, unless it be the fact that the foreman saw the obstruction and did not remove it was disputed by circumstances of such nature as to warrant the jury in believing that he did see it, or could have seen it by the exercise of the care required under the circumstances.

The verdict of the jury was obviously rendered upon the theory that if the foreman did not see it he, by the exercise of such care as a reasonably prudent person would have exercised under similar circumstances, could have seen it, and we venture to assert that from the facts in evidence, all of which are absolutely undisputed, there could have been no finding by any jury of reasonable men upon the question of negligence which would have been other and different from that found in this case, and they were amply supported by the evidence in drawing the conclusion they did.

It is useless for us to call the Court's attention to authorities upon the question of damages for delay, because they must be fully in the mind of the Court, and we respectfully ask this Court to grant us damages for delay herein, if the Court should take our view and hold that the specifications of error were obviously untenable.

Respectfully submitted,

Hallsyi

Attorney for Defendant in Error.

Harris

J C Jones Jr

Of Counsel.

Supreme Court of the United States.

No. 222.—October Term, 1902.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* Michael Carlin. } In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 6, 1903.]

The plaintiff in error brings this case here to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment in the Circuit Court for the Northern District of Texas, entered upon the verdict of a jury in favor of defendant in error on the trial of this action brought by him against the railway company to recover damages for personal injuries. On the trial it appeared that Carlin, the plaintiff below, was in the employment of the railway company in September, 1898, as a bridge carpenter. On that day he, with a number of others forming what is termed the bridge gang, of which George Welsh was foreman, was employed in making some repairs on a bridge near the Aledo water tank, not far from Weatherford, Texas. The bridge was over a creek, and was sixty to sixty-five feet long. The force got to work on the bridge about ten minutes after 8 o'clock in the morning under Welsh, the foreman. The surface of the bridge was plain; the ties were about eight inches apart, and there was nothing on top of them except the rails and the guard-rails, the rails being of ordinary size, and the guard-rails about ten inches from the rails and parallel with them. The guard-rails were eight inches wide and stood four inches above the ties, being let down over the ties about two inches, and were of wood. Some time after the men had been working on the bridge a freight train was seen approaching at the rate of from thirty to forty miles an hour. Within a very few minutes before the train was seen one of the workmen on the bridge had in his hand what is called a spike maul, used for the purpose of driving spike. The maul was of iron with a handle about three feet long, the hammer being six, eight or perhaps ten inches in length, and the handle went into the middle of the head, which had a double face. Carver was the man who was using the maul a few minutes before the train came. The maul weighed about ten pounds. At the time Carver was using the maul, he had it out on the bridge with him. A witness for the defendant stated that he had been using the maul on the south side of the bridge for putting up the staging

or scaffolding, and when he finished he handed it to some one on the top of the bridge, who handed it to Carver on the north side of the bridge, to spike on a brace. It was used but ten or fifteen minutes before the passage of the train. Carver stated he did not remember where he had put the maul when he had finished using it, but he said he was always careful to put it out of the way so there would be no accident. He had nailed the last piece of timber on the bridge and got down on the ground and was about ten feet from the plaintiff, and had not been there over three or four minutes when the train passed. The witness saw no other spike maul or hammer there that morning than the one which he used, which was the regular spike maul described by the witness, and which he found after the train passed.

The train coming from the west was seen some little distance before it reached the bridge and the people on the bridge got out of its way, and as the train passed over the bridge towards the east the plaintiff, who was standing a short distance from the east end of the bridge, was struck by the spike maul on the leg and was so badly injured that amputation of the leg above the knee was necessary and was performed. The train on its passage across the bridge struck the spike maul and threw it in the direction that the train was going with such force toward the plaintiff as to effect the injury mentioned, although the train was not seen to strike the maul nor was the maul seen to strike the plaintiff. All that is known is that the train passed the bridge, and as it passed the maul struck the plaintiff, and the handle was broken close up to the head.

It was customary when workmen were engaged in repairing a bridge for the foreman to see that the bridge was cleared and unobstructed whenever a train was about to pass. It was the duty of the workmen to put their tools out of the way when a train was coming, but it was specially the duty of the foreman to see that the bridge was clear, and "that was his business and that was what he was for." Welsh, the foreman of the bridge gang, testified that he had no recollection of seeing any one using the spike maul that morning; that he had been around all parts of the bridge, both on top and underneath it, before the train had passed. He says when he saw the train coming he looked up and down the track to see if everything was clear, and did not see anything, and stepped one side when the train was three or four hundred yards from him. He said he had plenty of time if there had been anything on the bridge to have taken it off; that when a man was using tools and got through with them he was supposed to take care of them and put them out of the way; that the foreman was liable to be anywhere about the bridge at any time, and could not be depended upon to be at any particular place, but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time. He also said

that he was foreman, and that as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him as well as the other bridge men who were working there that morning.

The evidence was not disputed that, although it was the business of each workman to see to it that his tools were not in the way of an approaching train, yet that it was particularly the duty of the foreman to see that the bridge was cleared from all obstacles when a train came.

This is in substance the evidence submitted to the jury upon the question of the negligence of the defendant.

The judge charged that the burden of proof was upon the plaintiff to show that the defendant was negligent and that the plaintiff was injured thereby; that the defendant was bound to exercise ordinary care to furnish a reasonably safe place within which employees could perform their duties; that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company, and that the negligence of which the defendant was accused consisted in the failure on the part of the foreman of the bridge gang to use ordinary care to remove or to see and remove the spike maul before the arrival of the train at the bridge.

The court also charged that, if the jury believed from the evidence that the spike maul was left on the bridge by a fellow-servant of the plaintiff, and that, at the time the train approached, the foreman of the bridge gang was the only person upon the bridge, and that he could, by the exercise of ordinary care, have seen the spike maul and removed it from the track and from proximity thereto, and if they believed it was on the track or within proximity thereto, and if the jury believed that it was the duty of the foreman to use such care to see that the track was clear and no obstructions on it, or so near to it as to be struck by a passing train, and if the jury believed that the foreman did not use that care, and that the spike maul was struck by the train and hurled against the plaintiff and caused the injuries, and if the jury believed it was the negligence of the foreman in failing to see and remove the spike maul, and if his negligence in that respect was the direct and proximate cause of the injuries sustained by the plaintiff, then the court charged that the plaintiff was entitled to recover, but that if the injury was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then the verdict should be for the defendant.

The court further charged that the defendant should not be held responsible for the consequences of an act of negligence which could not reasonably be foreseen, and that it was not actionable negligence to fail to do an act when it would not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to any one.

Various requests to charge were made by counsel for the defendant and refused by the court, not necessary to be here specifically mentioned.

The jury, as stated, found a verdict for the plaintiff.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

Two grounds have been urged upon the court for reversing this judgment and granting a new trial. One was that the negligence of the railway company, if any, was that of a fellow-servant, for which it was not liable; and (2) that there was no evidence of the negligence of the foreman, in failing to discover the maul or hammer upon the bridge, sufficient to warrant the jury in finding a verdict for the plaintiff.

The right to maintain this action is founded upon a statute of Texas, the material sections of which read as follows:

"ART. 4560*g*. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this State, who are entrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employes of such person, receiver or corporation, or with the authority to direct any other employe in the performance of any duty of such employe, are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employes.

"ART. 4560*h*. All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow-servants." (Sayles' Civil Statutes of Texas, 1897.)

With reference to this statute, counsel for the defendant requested the court to charge the jury that—

"Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty that may be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say, by the foreman and men alike as occasion and circumstances may require; then, in any such event, the act or duty of Welsh in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

This charge was refused, and counsel for defendant excepted.

The court did charge that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company. This charge was duly excepted to by defendant's counsel.

Defendant contends that if the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, it was not the failure to perform a duty peculiar to him, the foreman, and specially imposed upon him as such foreman within the meaning of article 4560*g*, because it was a duty resting equally upon all the members of the bridge gang. The testimony in regard to this question leaves no doubt as to the duty of the foreman, although it also appeared that when a man was using tools and got through with them he was supposed to put them out of the way where a train would not strike them, and it was his business to do so. The evidence showed in addition that it was the special business of the foreman to see that the track was unobstructed on the bridge when a train was about to cross, and that although the men were supposed to see that the track was clear, it was the foreman's business to supervise them and see that the men left a clear track as the train came on. This was his duty as foreman, and not as fellow-workman, and the duty of care on the part of the workmen under him to keep the tools off the track when the train came on the bridge in no degree lessened the duty of the foreman to see that the men under him did as they ought, and that a free and unobstructed track was left for the train. In other words, it was the special duty of the foreman, as such, to see that the men performed their duty.

The negligent act of the foreman did not arise in the performance of the duty of a mere servant, although each servant was under an obligation to be careful, but it was the negligent act of the vice-principal in the performance of his duty as such. As it was the special duty of the foreman to see that the men performed their duty, his neglect so to do was the neglect of a duty which he owed not as fellow-servant but as vice-principal within the statute above cited.

Upon the second ground, we are of opinion that there was evidence sufficient to go to the jury upon the question of the negligence of the foreman in failing to discover the maul upon the bridge immediately prior to the passage of the train. The foreman himself swears that he did look along the track just prior to the coming of the train, and that he did not see any obstruction on the track and did not see the spike maul in question. Whether he looked or not is under the evidence one of the material facts in the case. He says that he did, but we are of opinion that other facts proved in the case were of such a character as to make it proper to submit the question to the jury. The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness

where his testimony relates to the question of the performance or non-performance of a duty which he owed on account of the position which he occupied. It was, therefore, a question for the jury as to what measure of credence should be given to his testimony. Of course, the mere absence of evidence that the foreman did his duty would not be equivalent to evidence, direct or circumstantial, that he did not, and it rested with the plaintiff to show negligence of the foreman for which the defendant would be liable.

But there are certain facts proved in this case which we think rendered it necessary to submit the question of negligence to the jury, notwithstanding the testimony of the foreman. We have here a bridge not more than sixty or sixty-five feet long—an open top bridge, the surface of which was plain. The ties for the rails were the usual distance apart, and there was nothing on top of them except the rails themselves. The guard-rails were ten inches from the track and parallel with it, and they stood up about four inches above the ties. There was, therefore, nothing to obstruct or prevent the view of the length of the bridge by any one at either end and nothing to prevent the discovery of the maul if the glance of the individual were anything more than casual or formal. The maul could not have been hidden between the track and the guard-rails so as not to be above the track, for if the maul were lower than the track, the train could not have hit it, as it is perfectly clear that anything lower than the surface of the track could not be struck by the train. So it would seem quite obvious that if any one in the position of the foreman had looked, it would have been possible for him to have discovered this maul if it were there. Was it there? Workmen had been using the maul on the bridge during the morning and a few moments, not more than ten or fifteen minutes, prior to the crossing of the train. The maul was struck by it and hurled with great force, sufficient to break the handle, against the plaintiff, who was standing near the east end of the bridge. The man who was known to have used the maul a few minutes before the arrival of the train says himself that he has no recollection of what he did with it. Now, whether the maul were left exactly on the bridge, or just off the bridge, and so near the track as to be struck by the passing train, it is not necessary to determine, because if it had been left in a position just off the bridge, and yet so near the track as to be struck by the train, the failure of the foreman to see it and have it removed was the same as if it had been on the bridge. The maul being left so that it was struck by the train and hurled against the plaintiff, the failure of the foreman to see it might have been found by the jury to be a negligent failure, and it being his duty to see that the track was kept clear for the passage of trains, that failure was a neglect which was the proximate cause of the injury. To be sure, it was negligence on the part of the

servant who left the tool there in the first place, but after such negligence had occurred the duty of the foreman arose, and he had plenty of time in which to perform it, to overlook the bridge where the track was and see that there was no obstruction for the passing train, and his failure to look, or looking, to discover the obstruction, thus became the immediate and proximate cause of the injury which followed.

There is no other cause assignable for this injury than the fact that the train did strike the maul, and that fact is proved from the fact that it was thrown in the direction in which the train was going. Counsel for the defendant admits that the evidence shows that fact, but he avers that it does not appear that the maul was in such a position as to convict the foreman of negligence in not discovering it, and as to that fact counsel insists that the negligence of the foreman is disproved by the uncontradicted testimony.

The facts already stated rendered it necessary, in our judgment, to submit the question to the jury as to the negligence of the foreman, even although he testified that he looked and did not discover any obstacle on the bridge.

These two are the propositions particularly argued before us. We do not see in them any ground for disturbing the verdict of the jury.

We have looked at the other exceptions taken in the course of the trial and are of opinion that they do not show any error requiring a reversal of the judgment, and it is therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.